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CASE NO. ___

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,

Petitioner,

v.

DAVID WYANT,

Respondent.

STATE OF OHIO,

Petitioner,

v.

JAMES MAY, JR., et. al.,

Respondent.

STATE OF OHIO,

Petitioner,

v.

CLANCY VAN GUNDY, et. al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT
NOS. 91-199, 91-1519, 91-1211/1589**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER OHIO REVISED CODE SECTION 2927.12, WHICH PROVIDES FOR A PENALTY ENHANCEMENT IF CERTAIN CRIMINAL CONDUCT IS COMMITTED "BY REASON OF THE RACE, COLOR, RELIGION OR NATIONAL ORIGIN OF ANOTHER PERSON OR GROUP OF PERSONS", VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

PARTIES

The parties are the State of Ohio as the petitioner in all three matters; David Wyant as the respondent in Case No. 91-199, Ohio Supreme Court; James May, Jr., Mark Staton, and Aaron Plessinger, as respondents in Case No. 91-1519, Ohio Supreme Court; and Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., as respondents in Case No. 91-1211/91-1589, Ohio Supreme Court.

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The opinion of the Court of Appeals of Delaware County in *State v. Wyant*, No. 90 CA-2, December 6, 1990 is unreported. (A-22). The entry of the Court of Common Pleas of Delaware County in *State v. Wyant*, No. 89 CR-92, December 21, 1989 is unreported. (A-29).

The opinion of the Court of Appeals of Montgomery County in *State v. James B. May Jr., et. al.*, Nos. 12239, 12259, and 12260, June 27, 1991 is unreported. (A-50). The decisions of the Court of Common Pleas of Montgomery County in *State v. May, Jr.*, No. 89 CR-4687, *State v. Staton* and *State v. Plessinger*, both Nos. 90 CR-660, all decided May 15, 1990, are unreported. (A-59, 64, 65).

The opinion of the Court of Appeals of Franklin County in *State v. Van Gundy, et. al.*, Nos. 90 AP473, 474, 475, 477, 478, 479, 480, April 16, 1991 is unreported. (A-30). The decision of the Common Pleas Court of Franklin County in *State v. Van Gundy, et. al.*, Nos. 89 CR-11-5166, A-G, March 28, 1990 is unreported. (A-45).

JURISDICTION

The decision of the Ohio Supreme Court in *State v. Wyant, supra*, was issued August 26, 1992. No petition for rehearing was sought and the petition for writ of certiorari is timely filed. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ohio Constitution, Article I, Section 11.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motive and for justifiable ends, the party shall be acquitted.

Ohio Revised Code §2927.12, Pages 1987

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

STATEMENT OF THE CASE

WYANT

David Wyant was charged and convicted of ethnic intimidation in violation of Ohio Revised Code §2927.12. Under the Ohio statute, when certain predicate offenses (aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and telephone harassment) are committed "by reason of the race, color, religion or national origin of another person or group of persons" the penalty for such conduct is enhanced one penalty level higher than the penalty for the underlying predicate offense[1]. Wyant was found guilty in a jury trial and sentenced to one and one-half years imprisonment.

The underlying predicate conduct in Wyant's case was aggravated menacing. On May 29, 1989, Wyant and the complaining witnesses, Jerry White and Patricia McGowan had adjoining campsites in a state park. White and McGowan were black; Wyant and all the people in his party were white. Sometime between 10:30 and 11:45 p.m., Mr. White went to park officials to complain of loud music from the Wyant campsite. A park official went to the site and Wyant turned off the radio.

Fifteen or twenty minutes later, the radio came on again and White and McGowan heard racial epithets and threats made toward them. Wyant said: "We didn't have this problem until those niggers moved in next to us." "I ought to shoot that black mother fucker" and "I ought to kick his

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[1] A Wisconsin statute, Wis. Stat. 939.645 (1989-90) is the subject of a separate petition filed contemporaneously by the State of Wisconsin under the title, *State v. Todd Mitchell*. The Wisconsin and Ohio statutes are similar in providing for penalty enhancement for what are generally labelled "hate crimes". There are several differences in the statutes. One notable difference is that Wisconsin's statute provides enhanced penalties only when a victim is selected because of the victim's race, religion, etc. Under the Ohio statute, enhanced penalties are also provided for criminal conduct committed against a victim because of that victim's association with someone of a different race, religion, etc.

black ass." White and McGowan complained to park officials and left the park.

Prior to trial, Wyant moved to dismiss the charge of ethnic intimidation on the basis the statute was unconstitutional. The trial court denied the motion to dismiss and upon appeal the Court of Appeals of Delaware County, by 2-1 vote, affirmed. The Supreme Court of Ohio reversed, holding Revised Code §2927.12 to be unconstitutional.

MAY, STATON, PLESSINGER

James May, Jr., was charged with ethnic intimidation predicated on aggravated menacing. The trial court dismissed the charge on the basis that Revised Code §2927.12 was unconstitutional. Since the indictment was dismissed, there are no facts of record. The indictment alleged that May, a landlord, and several other white men threatened Gregory Crawford, a black tenant, and several of his friends, also black, with a gun, a tire iron, and racial slurs.

Mark Staton and Aaron Plessinger were charged with ethnic intimidation. The charges against them were dismissed by the trial court based on the ruling in May's case. The indictment alleged that Staton and Plessinger, who are white, threatened Jessie and Dianne Bowlin, who also are white, because they had black visitors in their home. Allegedly racial slurs and threats were made against the Bowlins and their visitors, a window was broken in the Bowlin house, and a car belonging to the visitors was damaged.

On appeal, the Court of Appeals of Montgomery County and the Ohio Supreme Court affirmed the dismissal of the ethnic intimidation charge.

VAN GUNDY, et. al.

Clancy Van Gundy and six others identified in the list of parties were charged with ethnic intimidation, predicated on aggravated menacing. In addition, Clancy Van Gundy was charged with felonious assault. Prior to trial, the trial court dismissed the ethnic intimidation charges against all seven

defendants, holding R.C. §2927.12 was unconstitutional. The trial of the felonious assault charge continued and Clancy Van Gundy was convicted of that charge. See, *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The indictment alleged that Clancy Van Gundy hit a black juvenile, Jason Harris, with a baseball bat following a chase during which he and his associates chanted racial threats.

Upon appeal, the Court of Appeals of Franklin County and the Ohio Supreme Court affirmed on the basis R.C. §2927.12 was unconstitutional.

OHIO SUPREME COURT

The constitutional challenges in the lower court proceedings were not uniform. Taken as a whole, however, R.C. §2927.12 was challenged as violating "freedom of speech" and vagueness, equal protection, due process, and overbreadth. The Ohio Supreme Court did not rule on any grounds other than "freedom of speech" holding that R.C. §2927.12 violated the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution. As discussed in the argument in support of certiorari, the latter holding is not an independent state ground, since Article I, Section 11 of the Ohio Constitution is coextensive with the First Amendment.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Court should grant certiorari to determine whether, consistent with the First Amendment to the United States Constitution, a penalty may be enhanced when criminal conduct is engaged in "by reason of the race, color, religion, or national origin of another person or group of persons". This is an issue which has not previously been addressed by this Court. The issue has national significance for similar state and federal criminal laws. The issue also impacts the validity of civil laws prohibiting discrimination. These civil and criminal laws use similar language to that found constitutionally offensive by the Ohio Supreme Court. The Court should hold that a penalty may be enhanced if criminal

conduct was committed "by reason of race, color, religion or national origin", since the harm to victims and society is greater in such situations than when the criminal conduct is engaged in for other reasons.

R.A.V.

Ohio Revised Code §2927.12 is not a novel statute. Like other penalty enhancement statutes, the Ohio legislature has increased the sentencing range for one form of criminal conduct because that criminal conduct is perceived to be more harmful to victims than other variations of the same conduct. Victim impact is a proper justification for enhanced punishment. *United States v. Sayler,* 893 F.2d 113 (6th Cir. 1989). There are numerous laws enhancing the penalty for criminal conduct against the young or the elderly, even though the underlying criminal conduct is the same as committed against others not in those age categories.

Ohio Revised Code §2927.12 is another example of a victim impact enhancement statute. The Ohio legislature recognized that there is special harm when criminal acts are committed against the victims of "hate crimes". Like crimes against the young or elderly, the victim of a hate crime may have been chosen just because of who the person is. Even if the victim is not singled out on such grounds, the impact of a hate crime is demonstrably greater. The Court in *Oregon v. Beebe,* 67 Or. App. 738, 740, 680 P.2d 11, 13 (1984), stated this proposition best:

> The legislature may legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion, or national origin is greater than the danger from such conduct under other circumstances. Assaultive behavior motivated by bigotry is directed not just at the victim, but in a sense, toward the group to which the particular victim belongs. Such confrontations therefore, readily — and commonly do — escalate from individual conflicts to mass disturbances. That is a far more serious potential

> consequence than that associated with the usual run of assault cases.

In rejecting the familiar premise that two forms of criminal conduct may be punished differently if sufficient justification exists for the increased penalty, the Ohio Supreme Court misunderstood the thrust of this Court's recent decision in *R.A.V. v. City of St. Paul*, 505 U.S. ____ , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The Court below believed penalty enhancement for criminal conduct committed "by reason of race," etc. was the viewpoint discrimination this Court found prohibited in *R.A.V.*. Ohio's statute, however, is far different from the cross burning ordinance in *R.A.V.*. Under the Ohio Supreme Court's reading of *R.A.V.*, seemingly all "hate crimes" statutes must fail under the First Amendment. The Court can reject that conclusion.

R.A.V. involved a "hate speech" statute aimed at speech and thought itself, rather than a "hate crime" statute aimed at a particular type of conduct. In *R.A.V.*, the Court stated:

> St. Paul has not singled out an especially offensive mode of expression — it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to the merely obnoxious) manner. *Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.*

Supra, 505 U.S. at ____ , 112 S.Ct. at 2549, 120 L.Ed.2d at 324. (Emphasis added.) The fault of the St. Paul ordinance was that it focused on the message that was communicated rather than the conduct through which the message was expressed.

Ohio's statute focuses instead on the conduct involved. In order to be subject to penalty enhancement under that statute, a criminal act must first occur. Only where an otherwise punishable criminal act has occurred do the penalty enhancements provided by Ohio Law come into play.

Even if considered to be expression, Ohio seeks to punish and deter only "an especially offensive mode of expression" — conduct, the commission of which is a crime.

This Court made clear in *R.A.V.* that its decision was not intended to undercut the network of federal and state laws prohibiting discriminatory conduct. This Court stated:

> . . . since words can in some circumstances violate laws directed not against speech, but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexual derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, . . . Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Supra, 505 U.S. at ____ , 112 S.Ct. at 2546-7, 120 L.Ed.2d at 321-22. (Citations omitted.) Ohio's law at issue here punishes discriminatory conduct, but does not target "expressive content". A person may think or say anything they want, no matter how deplorable, and may do so without fear of punishment. Only when that thought motivates otherwise criminal conduct may that person be charged under Ohio law. Then any thought behind the act is "swept up incidentally" within the conduct involved. The conduct of the person, thus, is not "shielded from regulation" by the fact the actor had a discriminatory idea or philosophy behind commission of the act.

The Ohio Supreme Court agreed that the conduct involved was proscribable consistent with the First Amendment. However, the lower court held this was true only under the

general criminal statute. According to the Chio court, the First Amendment prohibits raising the penalty for conduct which itself can be punished consistent with the First Amendment unless the penalty for all other forms of the same conduct is raised as well. Anything less would be "content based viewpoint discrimination". *R.A.V.* dealt with whether the message of "cross burning" could be prohibited consistent with the First Amendment in the first instance. As the Court stated in *R.A.V.*, the ordinance:

> . . . is not a prohibition of fighting words that are directed at certain persons or groups (which would be "*facially*" valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias motivated' hatred . . . .

505 U.S. at ____ , 112 S.Ct. at 2548, 120 L.Ed.2d at 323. The flaw of the Court below was attempting to apply the reasoning of that decision to a wholly different statute which differentiates two forms of conduct, each of which may admittedly be proscribed consistent with the First Amendment.

A fundamental difference from *R.A.V.* is that here conduct, not speech, is involved. However, even in the context of a "speech" statute, this Court in *R.A.V.* stated:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from the First Amendment protection, is also neutral enough to form the basis of distinction within the class.

Supra, 505 U.S. at ____ , 112 S.Ct. at 2545-6, 120 L.Ed.2d at 320-21. The entire class of threats is excluded from the First Amendment for the most neutral of reasons — a crime

has been committed. Such a reason is neutral enough to allow distinctions within the general category of threats based on the harm involved. Ohio's challenged law is an extension of this principle.

The Ohio Supreme Court approached Ohio's penalty enhancement statute simplisticly; it concluded that because the law was designed to address the problem of "hate crimes", it must constitute the same type of viewpoint discrimination this Court found impermissible in *R.A.V.*. Ohio's law provides enhanced penalties for the predicate offense, not because one viewpoint is believed to be better than another, however, but because crimes committed "by reason of race," etc., are deemed more dangerous to the victim and to society as a whole. This Court should use this case as a vehicle to further explain *R.A.V.*.

DAWSON

This Court can also use this case to square the holding of the Court below with this Court's decision in *Dawson v. Delaware*, 503 U.S. at ____ , 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). In *Dawson*, this Court reaffirmed the principle that a court may consider and use an offender's motivation in committing a crime as a basis for increasing the sentencing for that crime.

Dawson is a follow-up to this Court's earlier decision in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). In *Barclay*, the Court considered the trial court's explanation for its imposition of a death sentence. The trial court specifically discussed the racial motive for the murder and compared the murder victims to the victims of Nazi concentration camps. In rejecting a constitutional challenge to the imposition of the death penalty on the grounds that it was improper for the Court to consider the defendant's motives, this Court stated:

> We reject this argument. The United States Constitution does not prohibit a trial judge from

> taking into account the elements of racial hatred in this murder.

Supra, at 463 U.S. at 949, 103 S.Ct. at 3424, 77 L.Ed.2d at 1143. It would be anomalous to suggest that a judge may take racial hatred into account in his other sentencing decisions but that a legislature may not do the same when setting the penalty guidelines for that judge to follow. Ohio asserts that there is no constitutional distinction between the considerations deemed permissible in *Dawson* and those mandated by Ohio law.

In *Dawson*, this Court found that the trial court's reliance on the fact that the defendant was a member of a white power prison group was improper because that membership did not motivate the crimes committed. As such, this Court concluded that evidence of racial hatred *which was not material to the crime* should not be considered in sentencing. It expressly found, however, that where the motive is causally connectable to the crime at issue, that motive may be considered in a trial court's sentencing determinations. Where a person commits a criminal act against another "*by reason of* race, color," etc., the motive is, by definition causally linked to the crime at issue.

In *Dawson* and in *Barclay*, this Court sought to assure that the evidence considered in setting a sentence is reasonably and rationally related to that sentencing decision. Ohio's penalty enhancement law requires proof of that very relationship before an increased penalty can be imposed[2]. In fact, Ohio provides more protection against arbitrary

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[2] Another example of such a relationship is Section H, Federal Sentencing Guidelines which adds two levels to a penalty for a basic predicate offense to "reflect the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights". The enhanced penalties of Section H are associated with the federal criminal statutes involving racial, religious, or ethnic crimes, discussed under the next subheading of this petition. For the Court's information, Congress is currently considering H.R. 4797: the "Hate Crimes Sentencing Enhancement Act of 1992".

consideration in sentencing than what is required by the decisions in *Dawson* and *Barclay*. There the consideration of evidence is determined under the lesser standard of proof for sentencing. Ohio's statute requires proof beyond a reasonable doubt as part of the criminal conviction itself. The Court should accept certiorari to reconcile the Supreme Court of Ohio's decision with *Dawson*.

IMPACT ON FEDERAL CRIMINAL STATUTES

The Ohio Supreme Court failed to square its holding in this case with federal criminal statutes like 18 U.S.C §242. That statute and others utilize the very same statutory language deemed impermissible by the Ohio Supreme Court. This, despite the fact that this Court in *R.A.V.* cited to 18 U.S.C. §242 as an example of the type of statute that is proper under the First Amendment. *R.A.V.*, 112 S.Ct. at 2546, 120 L.Ed.2d at 322.

18 U.S.C. §242 prohibits willfully subjecting an "inhabitant . . . to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens . . .". Other statutes prohibit disqualification of a juror "on account of race, color, or previous condition of servitude", 18 U.S.C. §243, or willfully injuring, intimidating, or interfering with "any person because of his race, color, religion, or national origin" in participating in various federally protected activities, 18 U.S.C. §245(b)(2). Ohio's law provides for enhanced penalties for certain crimes when committed "by reason of race, color, religion, or national origin". If, as claimed, the First Amendment prohibits making distinctions in conduct based on discriminatory motive, then surely these federal statutes would be unconstitutional as well. As this Court well knows, however, statutes like these or their predecessors have existed and been utilized since reconstruction in society's battle against "hate crimes". *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1950). As an example, in *United States v. White*, 788 F.2d 390 (6th Cir. 1986), 18 U.S.C. §242 was

used to punish the firebombing of a black person's house. In *United States v. Ebens*, 800 R.2d 1422 (6th Cir. 1986), 18 U.S.C. 245 was violated by the beating death of an oriental.

In short, there is substantial historical precedent for punishing conduct that occurs on "account of race, color," etc. *R.A.V.* was not intended as a broad based retroactive challenge to these laws which have long been considered constitutional. The Court should accept certiorari if for no other reason than to ratify the continuing validity of these federal criminal statutes.

IMPACT ON CIVIL DISCRIMINATION LAWS

Just as the decision below potentially impacts federal criminal laws, it also impacts state and federal civil laws prohibiting discrimination. There are literally thousands of laws using the precise words which the Ohio Supreme Court now finds violate the First Amendment. As an illustration only, 42 U.S.C. §2000 C-6(a)(2) prohibits discrimination in admission to public colleges "by reason of race, color, religion, sex, or national origin". Ohio Revised Code §4112.02(H) generally prohibits discrimination in housing "because of race, color, religion, sex, ancestry, handicap, or national origin", and Section (H)(12) thereof prohibits any person from intimidating another because of the exercise of any right protected or granted by that section. Laws like these are directly aimed at and designed to prevent and provide redress against discrimination. If one followed the Ohio Supreme Court's reasoning, the validity of these laws would be called into question and society's efforts to prohibit discrimination would be seriously curtailed.

Apparently recognizing this concern, the Ohio Supreme Court attempted to distinguish the law it struck down in this case from other laws attempting to redress the same harm. The distinction, according to the Court, is, that general anti-discrimination laws target the *act* of discrimination, not the bigoted motive. *Wyant*, slip op. at 10 (A-13). But, as the Ohio Supreme Court itself recognized, "[d]iscriminatory motive is necessary to [a disparate treatment] theory of employment

discrimination". *Id.* An act of discrimination is simply the carrying out of certain behavior because of a discriminatory motive. Any "distinction" between the two is necessarily an artificial one — one presumes the existence of the other.

The Ohio Supreme Court also claimed that discrimination laws prohibit differences in treatment and the consequences thereof, rather than discriminatory motive. *Id.* Ohio's penalty enhancement law does the same. A victim of a "hate crime" is treated differently (e.g., is harassed in a particular way) because the offender intends to cause a specific harm to that person because of racial or religious animus. And, as discussed previously, there is a quantum difference in harm to society as a result of a racially or religiously motivated criminal act.

The distinction the Ohio Supreme Court seeks to draw is an illusory one. Under many existing laws, conduct which is not punishable becomes punishable solely because of the discriminatory motive behind it. Ohio's ethnic intimidation act merely enhances the penalty for what is already punishable conduct. If "by reason of race," etc., is viewpoint discrimination in Ohio's penalty enhancement law, it surely must also be viewpoint discrimination to make unlawful, by discriminatory motive, that which otherwise would be lawful. In *State v. Mitchell*, 169 Wisc.2d 153, 485 N.W.2d 807 (1992), Judge Bablitch, in dissent, criticized a similar distinction as "the majority's constitutional pen gets too close to the trees and fails to see the forest". *Id.* (J. Bablitch, dissent, 485 N.W.2d at 820.) The Court should grant certiorari to preserve the forest of discrimination laws.

IMPACT ON THE LAW OF OTHER STATES/ CONFLICT IN STATE COURT DECISIONS

Ohio's statute was based on a model draft by the Anti-Defamation League. There are over 20 states which have "hate crime" statutes based on the ADL model legislation. In addition, 46 states have some form of "hate crime statute". (Statutes compiled in *Anti-Defamation League, Hate Crime Statutes: A Response To Anti-Semitism, Vandalism, and*

Violent Bigotry, 1990; and ADL Law Report, Hate Crimes Statutes: A 1991 Status Report.) The decision of the Ohio Supreme Court acts as precedent for a challenge to all of these existing laws. The Court should review Ohio's statute to guide assessments of the validity of similar statutes.

In addition, the Court should grant certiorari to resolve a direct conflict in state court decisions. The highest courts to have ruled on the validity of similar statutes in Oregon, New York, Michigan, and Vermont have all upheld their state statutes. *State v. Hendrix*, 107 Or.App. 734; 813 P.2d 1115 (1991); *People v. Grupe*, 141 Misc.2d 6; 532 N.Y.S.2d 815 (1988); *People v. Justice*, No. 90- 25264 FH, Circuit Court, Washtenaw County, Michigan, June 5, 1991; *State v. LaDue*, No. 4088-8-90 Cm. Cr. Vermont Dist. Ct., Unit 2, April 18, 1991. On the other hand, the Wisconsin Supreme Court held their statute unconstitutional in *State v. Mitchell, supra.* [reversing 163 Wis.2d 652; 473 N.W.2d 1.] A petition for certiorari has been filed by Wisconsin in *Mitchell.* In addition, various and conflicting lower court decisions in Florida are on appeal to the Florida Supreme Court. *State v. Stalder*, 599 So.2d, 1280 (Fla. 1991). (Court accepted jurisdiction to "pass[ed] upon a question of great public importance requiring immediate resolution by this Court.")

Most recently, the Oregon Supreme Court issued its opinion in *State v. Plowman*, No. S38328, ____ Or. ____, ____ P.2d ____ (1992), 1992 Ore. LEXIS 158 (August 27, 1992), upholding Oregon's "hate crimes" law. The Court specifically notes the Wisconsin opinion in *Mitchell, supra*, but concludes; "we disagree with that reasoning". *Plowman, supra*, slip opinion at page 15, 1992 Ore. LEXIS 158 at 22. *Plowman* also recognizes this Court's decision in *R.A.V.*, but concludes, as Ohio argues, that *R.A.V.* involved a statute "directed against the substance of speech" as opposed to "laws that are directed against conduct". *Plowman, supra*, slip opinion at page 14, 1992 Ore. LEXIS 158 at 20. The Court should resolve the dispute among state courts on this issue of truly national importance.

SOCIAL IMPACT

It is hard to imagine another decision that could have as much social impact as the decision of the Court below. The Ohio Supreme Court itself recognized the problem and dilemma of "hate crimes" and deplored that such a situation exists in our society. Congress has also recognized the special problem of hate crimes by passing the "Hate Crimes Statistics Act of 1990", Pub. L. No. 101-275. Not a day goes by that citizens are not shocked by a newspaper's reporting another incident involving one person's intolerance toward another. Yet the Court below holds that the First Amendment prohibits recognizing and treating this special problem by more severely punishing the predicate offense.

The Court below takes the view that Ohio has punished the underlying conduct through the normal criminal penalties and therefore cannot increase the penalty for a racial or religious crime. Presumably if the legislature wishes to raise the penalty for racial and religious crimes, it can raise the penalty for the underlying predicate offense. However, that legislative response would not make any sense since it would increase the penalty for some individual conduct for which the legislature deems existing deterrence to be adequate to regulate other conduct for which the legislature deems existing deterrence to be inadequate. In addition, such a legislative response would not recognize the special stigmatization of the victim of a racial or religious crime or express society's condemnation of such criminal behavior. While *R.A.V.* prohibits viewpoint discrimination against various types of expression, it does not require society to turn a blind eye to conduct directed at victims "by reason of race", or the harm thereby caused. The Court should address whether additional protections may be extended by a legislature to these victims.

OHIO'S STATUTE IS CONSTITUTIONAL

The Ohio Supreme Court believed a "thought crime" statute had been enacted. The lower court believed that penalty enhancement was directly penalizing an offender's

discriminatory motive. It is not; penalty enhancement punishes conduct and it does so in a manner which reflects additional harm to the victim and society as a whole. The statute addresses itself to conduct committed "by reason of race," etc., to advise potential offenders of what conduct will be deemed more harmful to society and, thus, subject to penalty enhancement. The purpose of the penalty enhancement itself is not to punish "discriminatory thoughts".

Even if the statute is viewed as punishing "discriminatory motive", it is constitutional.

First, it is possible to violate the Ohio law at issue here without having any motive other than to discriminate against a person or persons in a protected class. For example, if a person committed telephone harassment (one of the underlying predicate offenses) to drive a minority out of a neighborhood, it would not matter whether his motivation was because he hated minorities or he felt their presence hurt his property values. What prompts a violator to discriminate is irrelevant. As under the discrimination statutes, the conduct being prohibited is the discrimination itself, regardless of the ideas or philosophy prompting it.

Second, to the extent discriminatory motive is involved, it actually makes it more difficult for the State to obtain a conviction than it would be to obtain a conviction for the underlying predicate offense. The highest degree of mental intent required under the predicate offenses is "knowingly". R.C. §2901.22 defines purpose as a person's "specific intention to cause a certain result". Knowingly requires a lesser showing of mental intent than purpose because a person can act knowingly "regardless of his purpose". If a person acts with a specific discriminatory motivation, he actually acts purposefully to "cause a specific result". While motive and intent are not always the same, a discriminatory motive and the purpose to cause specific harm are co-extensive.

Third, under Ohio law, motive is not normally an element of a crime. That does not mean, however, that motive may

never constitutionally be made an element of the crime. If, as *Dawson* holds, the First Amendment does not prohibit consideration of "racial motivation" in the sentencing phase, it should not prohibit a legislature from merging the sentencing considerations into the definition of a crime.

Ohio has no doubt that an enhancement based solely on the "message" conveyed would be impermissible. There would not even be an equal protection rational basis for distinguishing the punishment for two types of proscribable conduct if the sole purpose was to suppress the message. In the words of *Dawson*, the message would not be material to the crime; in the words of *R.A.V.*, the distinction would not be "swept up incidentally within the reach of a statute directed at conduct, rather than speech". Ohio's ethnic intimidation statute fails neither *Dawson* nor *R.A.V.*.

INDEPENDENT STATE GROUNDS

It is anticipated that respondents will argue certiorari should not be granted since the Court found R.C. §2927.12 to also violate Article I, Section 11 of the Ohio Constitution. However, it is clear that the Ohio Court's opinion was not based on an independent state ground.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court set forth the standard for judging an independent state ground. Basically, the Court held that a state court must make clear in its opinion that a decision was being reached on the state constitutional ground independent of any belief that such result was dictated by the Court's decision on federal constitutional grounds. There is no indication that has occurred here.

In *Michigan*, the Court stated that it is not enough to merely mention or cite to the State constitutional prohibition. Instead, the Court stated:

> . . . when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when

> the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1041, 103 S.Ct. at 3476, 77 L.Ed.2d at 1208. There is no independent analysis of the State constitution in the opinion of the court below. Once the Court below found that a thought crime statute existed under the First Amendment, its holding that the statute also violated Article I, Section 11 was foreordained. As a result, the state constitutional holding is clearly based on and interwoven with federal law. In *State, ex. rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio St.3d 354, 588 N.E.2d 116, the Ohio Supreme Court adopted a lower court holding that Ohio's constitutional guarantee of free speech is identical to that contained in the First Amendment.

> Appellants have cited no Ohio case, nor has our research discovered any authority, for the proposition that the free speech guarantees accorded by the Ohio Constitution are broader than those provided under the United States Constitution.

63 Ohio St.3d at 362. There is no reason to believe the lower court departed from that view in this case.

The Ohio Supreme Court is well aware of the rule in *Michigan v. Long, supra.* In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), this Court held that the Ohio Supreme Court's decision below did not rest on independent state grounds even though the Ohio Supreme Court invoked the free speech guarantees of Article I, Section 11 of the Ohio Constitution as well as the First Amendment. See also, *Ohio v. Johnson,* 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) to the same effect with respect to a different constitutional provision. Based on the treatment of its opinions in *Milkovich and Johnson,* if the

Ohio Supreme Court meant its decision to be based on independent state constitutional grounds thereby foreclosing review by this Court, it was well aware that an unambiguous statement of intention to do so was required.

For all the above reasons, the Court should grant certiorari and reverse.

STATE v. WYANT
Statement of the Case

THE STATE OF OHIO, APPELLEE, v. WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT, v. MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT, v. STATON ET AL., APPELLEES.

THE STATE OF OHIO, APPELLANT, v. VAN GUNDY ET AL., APPELLEES.

[Cite as State v. Wyant (1992), --- Ohio St.3d ---]

Criminal law — Ethnic intimidation — R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

(Nos. 91-199, 91-1519 and 91-1211/91-1589 Submitted April 15, 1992-Decided August 26, 1992.)

APPEAL from the Court of Appeals for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the

Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else, and so he rented L- 18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A part official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant. Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the State, the Court of Appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware app. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. See *State v. Van Gundy* (1992), 64 Ohio St.3d 230,594 N.E. 2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*, certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.
Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.
Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.
Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric*

A. Walker as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91- 1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91- 199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart; Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No 91-199.
Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order of Police and Buckeye State Sheriff's Association in case No. 91-199.
Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, City of Columbus in case Nos. 91-1211/91-1589.
Jones, Day, Reavis & Pogue, *Steven T. Catlett* and *Richard A. Cordray*; *Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft*; *Ruth L. Lansner*, *Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.
Alphonse A. Gerhardstein, urging reversal for *amici curiae*, Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

HERBERT R. BROWN, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society- threatening problem. However, the legislative response to this problem must not violate the Ohio

and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I
The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons."

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering

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[1] R.C. 2903.21 (aggravated menacing reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

[2] R.C. 2903.22 (menancing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

(R.C. 2909.06),[3] criminal mischief (R.C. 2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], [5]).[5]

The predicate offenses to ethnic intimidation are already punishable under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying

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[3] R.C. 2909.06 (criminal damaging or endangering) reads in part:
"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:
"(1) Knowingly, by any means;
"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

[4] R.C. 2909.07 (criminal mischief) reads in part:
"(A) No person shall:
"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

[5] R.C. 2917.21 (telephone harassment) reads in part:
"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:
" * * *
"(3) During the telephone call, violates section 2903.21 of the Revised Code;
"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;
"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318-324; see, also, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C-890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of

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[6] Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's state of

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[7] The Ohio Statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psychopath, on the other hand, may intend to kill and yet have no motive.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this content is not the same

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[8] Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

[9] The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present;

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can increase

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[9] Footnote 8 *cont.*

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code.

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

[10] LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes as not being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C
Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing

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[11] R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender." * * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the act of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and "disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854-1855, 52 L.Ed.2d 396, 415, fn.15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in

treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265-266, 97 S.Ct. 555, 563-564, 50 L.Ed.2d 450, 464-465. It is discriminatory treatment that is the object of punishment, not the bigoted attitude *per se.* " * * * Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs, supra,* 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12] Federal First Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

"[A[t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

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[12] The First Amendment to the United States Constitution reads:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
Section 11, Article I of the Ohio Constitution reads:
"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565-566, 89 S.Ct. 1243, 1248-1249, 22 L.Ed.2d 542, 550, stated as follows:

" * * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

" * * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[13] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there

[13] The parties do not contest that the predicate offenses are punishable.

are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to have "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?[14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly—and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First

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[14] As Judge West of the Franklin County Court of Common Pleas said: "[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported.

Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherisn." *Loca Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

" * * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches'."

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564; "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law.

R.A.V. v. St. Paul (1992), 505 U.S. ---, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads:

" 'Whoever places on pubic or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.' " *Id.*, 505 U.S. at ---, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct; that is, conduct which will arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ---, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on content.

The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), --- Wis.2d ---, ---, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. 939.645 (1989-90).

Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought." *Id.* at ---, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra,* 505 U.S. at ---, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) over- breadth. These arguments may have merit, especially in view of the concurring opinion by Justice White in *R.A.V. v. St. Paul, supra,* 505 U.S. at ---,

112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case No. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgments accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, JR., of the First Appellate District, sitting for SWEENEY, J.

FILED, December 6, 1990

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	
	:	
	:	JUDGMENT ENTRY
-vs-	:	
	:	
DAVID WYANT,	:	
	:	
Defendant-Appellant	:	CASE NO. 90-CA-2

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed, and this cause is remanded to that court for execution of sentence.

W. SCOTT GWIN

NORMAN J. PUTMAN

JUDGES

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Norman J. Putman, P.J.
Plaintiff-Appellee	:	Hon. John R. Milligan, J.
	:	Hon. W. Scott Gwin, J.
-vs-	:	
	:	
DAVID WYANT,	:	Case No. 90-CA-2
	:	
Defendant-Appellant	:	
	:	
	:	OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. 89-CR-92

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: 1990 DEC -6 PM 12:23

APPEARANCES:

For Plaintiff-Appellee

SUE ANN REULBACH
Assistant Prosecutor
149 North Sandusky Street
Delaware, Ohio 43015

For Defendant-Appellant

JAMES H. KLEIN
2 West Winter Street, Suite 9
Delaware, Ohio 43015

GWIN,J.

Appellant, David Wyant (appellant), appeals from the judgment of conviction and sentence entered upon a unanimous jury verdict of guilty to the charge of Ethnic Intimidation, in violation of R.C. 2927.12(A). Appellant assigns the following as error:

> I. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS FOR VIOLATION OF O.R.C. SECTION 2927.12 (ETHNIC INTIMIDATION) SHOULD BE REVERSED BECAUSE, THE LAW UPON WHICH THE CONVICTION IS BASED, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AS TO SAFEGUARDS AGAINST VAGUE AND UNCERTAIN CRIMINAL PROSECUTION.
>
> II. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS SHOULD BE REVERSED BECAUSE O.R.C. SECTION 2927.12 VIOLATES ESSENTIAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AS SET FORTH IN THE UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT.
>
> III. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS SHOULD BE REVERSED BECAUSE O.R.C. SECTION 2927.12 IS UNCONSTITUTIONALLY VAGUE AND OVER-BROAD ON ITS FACE IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENT ONE, AND THE OHIO CONSTITUTION, ARTICLE I, SECTION 11.

On August 10, 1989, an indictment was filed in the Common Pleas Court charging that appellant:

> . . . did violate section 2903.21 of the Ohio Revised Code, Aggravated Menacing, by reason of the race,

> color, religion or national origin of Jerry L. White and Patricia McGowan, to wit: did, knowingly cause Jerry L. White and Patricia McGowan to believe that he, the said DAVID WYANT, would cause serious physical harm to the person or property of said the Jerry L. White and Patricia McGowan, this being in violation of Section 2927.12 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

The charge arose while appellant was at his rented camp site at Alum Creek State Park in Delaware County on or about June 3, 1989. The adjoining camp site was rented and occupied by Jerry White and his girlfriend, Patricia McGowan. During the latter part of that evening, Mr. White on two separate occasions complained of loud music and noise from appellant's camp site.

Following a visit by a park official, appellant yelled that "we didn't have this problem until those niggers moved in next to us;" and "the black motherfucker over there, I will take my gun and kill him;" and "in fact, I will go over there and beat his black ass now."

I & II

Through his first two assignments, appellant claimed that R.C. 2927.12 is unconstitutional in that it violates the due process and equal protection clauses of the Fourteenth Amendment.

The record before us indicates that the only constitutional claim made by appellant in the trial court was that R.C. 2927.12 was unconstitutional because it violated his constitutional right to free speech under the First Amendment of the United States Constitution. Appellant made no other constitutional claim through written motion and none were specifically pointed out in the transcript on appeal. See App. R. 12(A).

Accordingly, we adhere to the well-settled principle that

we will not consider a claim of error which was neither raised or objected to in the trial court, even if the error alleged is constitutional. See *State v. Abrams* (1974), 39 Ohio St.2d 53, 55, 68 O.O. 2d 30,31. See, also, *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 34 O.O. 2d 13.

Therefore, appellant has waived his first two assignments of error, and the same are hereby overruled.

III

In his final assignment, appellant claims that R.C. 2927.12 is so vague and overbroad on its face that it violates appellant's right to free speech as guaranteed by the First Amendment of the U.S. Constitution.

R.C. 2927.12 provides:

> (A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

It has long been stated that "freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. Griffin* (1938), 303 U.S. 444, 450. However, the right of free speech is not an absolute right and may be limited or punished if it is likely to provoke the average person to retaliation thereby causing a breach of the peace. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568.

Courts are also to "refrain from declaring legislation unconstitutional unless the posture of a cause leaves no logical alternative thereto." *Beford Hts. v. Tallarico* (1971), 25 Ohio St.2d 211, 212.

Here, we construe the statute in question as a legislative attempt to preserve the public peace and as applied to appellant, is not so vague and overbroad as to deprive him of his freedom of speech guaranteed by the United States Constitution.

Certainly, appellant's racially motivated threats that "we didn't have this problem until those niggers moved in next to us;" "the black motherfucker over there, I will take my gun and kill him;" and "I will go over there and beat his black ass now" are not constitutionally protected speech because such would likely cause a breach of the peace.

Appellant was found to have knowingly caused another to believe that he would cause serious physical harm to that person in violation of R.C. 2903.21, Aggravated Menacing. Because appellant's violation of R.C. 2903.21 involved the use of racial slurs which were likely to cause a breach of peace, appellant was indicted for violating R.C. 2927.12. Therefore, when construed together, these statutes proscribe with sufficient exactness appellant's type of conduct while not impeding upon constitutionally protected speech.

Accordingly, we overrule this final assignment.

For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas is hereby affirmed, and we remand this cause to that court for execution of sentence.

Putman, P.J. concurs.
Milligan, J. dissents.

W. Scott Gwin

Norman J. Putman

JUDGES

Delaware County, Case No. 90-CA-2, Dissenting Opinion

MILLIGAN, J., DISSENTING

I would sustain each of the assignments of error and reverse the judgment of the Delaware County Common Pleas Court for the reasons stated in the opinion of Judge Patrick West in *State v. Culp* (March 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported, attached and incorporated.

JOHN R. MILLIGAN

JUDGE JOHN R. MILLIGAN

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO,	:	
Plaintiff,	:	
-vs-	:	Case No. 89-CR-92
DAVID WYANT,	:	
Defendant.	:	

JUDGMENT ENTRY ON RULING ON MOTION TO DISMISS

This case came before the court for Hearing upon Defendant's Motion to Dismiss and Memorandum in Support thereof, the same having been filed on October 10, 1989 at 8:14 o'clock and prior to the 9:00 o'clock A.M. commencement of the Trial of this case. Essentially, the thrust of Defendant's Motion is that the legislation under which the Defendant was charged, Section 2927.12(A) of the Ohio Revised Code, flies directly in the face of the First Amendment to the United States Constitution and is therefore unconstitutional. Upon consideration thereof, the Court found that the arguments advanced by the Defendant were without merit, and, accordingly, Defendant's Motion was overruled.

Insofar as the State of Ohio failed to prepare a Judgment Entry upon the Court's Ruling and Defendant's Motion, as required by Local Rule 15, the Court, pursuant to the second sentence of the second paragraph of Local Rule 15 has caused the instant Judgment Entry to be prepared.

Dated: December 21, 1989

Henry E. Shaw Jr.

HENRY E. SHAW, JR., JUDGE

cc: Sue Ann Reulbach, Assistant Prosecuting Attorney
Kelly M. Castle, Assistant Prosecuting Attorney
William J. Fleck, Jr., 555 South Third Street, Columbus, Ohio 43215

FILED, April 18, 1991

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-478
Bryan Krebs, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-479
Charles Culp, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-480
Terry Breedlove, Jr., Defendant-Appellee.	:	(REGULAR CALENDAR)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on April 16, 1991, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

BOWMAN, P.J., YOUNG & KLINE, JJ.

By Donna Bowman
Judge Donna Bowman, P.J.

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

cc: Mr. Michael Miller
Mr. Alan C. Travis
Mr. Harold Wonnell
Mr. Andrew Lyles
Mr. Samuel Weiner
Mr. James Kura
Mr. Alan V. Adair
Mr. Daniel T. Kobil
Ms. Susan B. Gellman
Mr. Arnold White
Mr. Thomas M. Tyack
Mr. Terry Breedlove, Jr.
Mr. Lee I. Fisher
Mr. Richard A. Cordray
Mr. Lee Fisher
Mr. Simon B. Karas
Mr. Eric A. Walker
Mr. Alan Wayne Sheppard
Mr. Steven T. Catlett
Mr. Alphonse A. Gerhardstein
Mr. Ronald J. O'Brien
Mr. James J. Fais
Mr. Thomas K. Lindsey

Mr. Harry R. Reinhart
Ms. Nicholette Dioguardi

FILED, April 16, 1991

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-478
Bryan Krebs, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-479
Charles Culp, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	

v.	:	No. 90AP-480
Terry Breedlove, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

OPINION
Rendered on April 16, 1992

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellant.

WONNELL, JANES & WONNELL, and MR. HAROLD WONNELL, for appellee Clancy Van Gundy. MR. ANDREW LYLES, for appellee Casey Van Gundy.

MR. SAMUEL WEINER, for appellee Franklin Clay.

MR. JAMES KURA, Public Defender, and MR. ALAN V. ADAIR, for appellee Robert Eric Blazer.

MS. SUSAN B. GELLMAN; WHITE & STOREY, and MR. ARNOLD WHITE, for appellee Charles Culp.

THOMAS M. TYACK & ASSOCIATES, and MR. THOMAS M. TYACK, for appellee Bryan Krebs.

MR. TERRY BREEDLOVE, JR., pro se.

HAHN, LOESER & PARKS, and MR. LEE I. FISHER; JONES, DAY, REAVIS & POGUE, and MR. RICHARD A. CORDRAY, for amicus curiae Senator Lee I. Fisher.

MR. LEE FISHER, Attorney General, MR. SIMON B. KARAS and MR. ERIC A. WALKER, for amicus curiae Attorney General.

SHEPPARD AND BALE, and MR. ALAN WAYNE SHEPPARD, for amicus curiae Ohio Council of Churches.

JONES, DAY, REAVIS & POGUE, and MR. STEVEN T. CATLETT, for amicus curiae Anti-Defamation League.

MR. ALPHONSE A. GERHARDSTEIN, for amicus curiae Housing Opportunities Made Equal.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS, City Prosecutor, and MR. THOMAS K. LINDSEY, for amicus curiae City of Columbus.

MR. HARRY R. REINHART; ESLOCKAR, GRIM, HODSON & DIOGUARDI, and MS NICHOLETTE DIOGUARDI, for amicus curiae Ohio Association of Criminal Defense Lawyers.

APPEALS from the Franklin County Court of Common Pleas.

BOWMAN, P.J.

On November 8, 1989, the Franklin County Grand Jury returned an eight-count indictment against appellees, Clancy Van Gundy, Casey Van Gundy, Franklin Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., charging each of them with seven counts of ethnic intimidation, R.C. 2927.12. The charges were predicated on the underlying offense of aggravated menacing, R.C. 2903.21, in that appellees did knowingly cause the victims to believe that appellees would cause serious physical harm to them by reason of their race, color, religion or national origin. Clancy Van Gundy was also charged with felonious assault, R.C. 2903.11, in that he did knowingly cause serious physical harm to one of the victims, Jason Harris, and with a specification, pursuant to R.C. 2941.143, in that Clancy Van Gundy did, during the commission of the felonious assault, cause physical harm to Jason Harris.

On March 14, 1990, a hearing was held before the trial court on appellees' motion to dismiss the seven counts of ethnic intimidation on the basis that the ethnic intimidation statute was unconstitutional. After arguments, the court found that R.C. 2927.12 was unconstitutionally overbroad and vague

and granted appellees' motion to dismiss the seven counts of ethnic intimidation.

Thereafter, on March 28, 1990, the trial court issued a written opinion stating that R.C. 2927.12 was unconstitutional because it was vague, it violated the due process and equal protection clauses, and it had a chilling effect upon the First Amendment rights of free speech and association. The trial court dismissed Counts Two through Eight of the indictments against all of the appellees; however, Count One of the indictment, pertaining to the felonious assault charge and specification as to appellee, Clancy Van Gundy, was not dismissed and was to be tried at a later date.[1]

On April 26, 1990, appellant, the state of Ohio, appealed the dismissal of Counts Two through Eight of the indictments as to all appellees.[2] Appellant asserts the following assignment of error:

> "OHIO REVISED CODE, SECTION 2927.12, ETHNIC INTIMIDATION, VIOLATES NO CONSTITUTIONAL PROVISION AND IS NOT VAGUE OR OVERBROAD."

The issue presented to this Court is whether R.C. 2927.12 is void for vagueness or is overbroad. Appellant asserts that the statute is neither vague nor overbroad and, therefore, the trial court erred in holding it unconstitutional, and in dismissing the counts of ethnic intimidation against appellees.

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[1] Van Gundy's subsequent conviction for felonious assault was affirmed by this court in *State v. Van Gundy* (Dec. 20, 1990), Franklin App. No. 90AP-556, unreported (1990 Opinions 5876).

[2] This court notes that appellee, Terry Breedlove, Jr., has failed to file a brief in this case. However, inasmuch as the facts and issues have been briefed by the remaining appellees and are identical to all parties, this court need not accept appellant's statement of the facts and issues as correct as to appellee, Breedlove, based on his failure to file a brief. See App. R. 18(C).

R.C. 2927.12 provides:

> "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The Due Process Clause of the Fourteenth Amendment requires reasonable definiteness in the language of a statute. *Roth v. United States* (1957), 354 U.S. 476. In *United States v. Harriss* (1954), 347 U.S. 612, the United States Supreme Court stated that the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The vagueness doctrine contemplates that criminal responsibility should not attach where an individual could not, with reasonable certainty, understand that his proposed conduct is disapproved of when measured against the language of the statute. See *State v. Loless* (1986), 31 Ohio App. 3d 5.

However, a statute is not void for vagueness merely because it could have been more precisely worded. *Roth, supra.* The legislature need not define every word of a statute, and words of ordinary usage will be given the meaning commonly attributed to them. *State v. Dorso* (1983), 4 Ohio St. 3d 60. The test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan v. DeGeorge* (1951), 341 U.S. 223.

The root of the vagueness doctrine is a rough idea of fairness. *Colten v. Commonwealth of Kentucky* (1972), 407 U.S. 104. The vagueness doctrine implies that a statute must be written so a man of common intelligence can ascertain what conduct is prohibited, and that the law must provide sufficient standards to prevent arbitrary and discriminatory enforcement. *Connally v. General Const. Co.* (1926), 269 U.S. 385; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156.

In *Connally, supra*, the court stated that the dividing line between what is lawful and unlawful cannot be left to conjecture. The crime, and the elements constituting the crime, must be so clearly expressed that an ordinary person can intelligently choose, in advance, what course of conduct he may lawfully pursue.

Under the void for vagueness doctrine, the statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; however, in addition, the void for vagueness doctrine also requires that the statute must provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. It is this second aspect of the void for vagueness doctrine, the requirement that the legislature establish minimal guidelines to govern law enforcement, that the courts have recently recognized as being the more important aspect of the doctrine. *Kolender v. Lawson* (1983), 461 U.s. 352. Where the legislature fails to provide these minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal prejudices. *Smith v. Goguen* (1974), 415 U.S. 566. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, and with the danger of arbitrary and discriminatory application. *Grayned v. City of Rockford* (1972), 408 U.S. 104.

This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited.

The statute states that no person shall violate any one of the enumerated sections " * * * by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, *i.e.*, the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

More importantly, the statute is void for vagueness because it encourages arbitrary and discriminatory enforcement. The statute vests virtually complete discretion in the hands of the state to determine whether a suspect committed the alleged acts based on the race, color, religion or national origin of another person or a group of persons. As such, the statute confers on the police a virtually unrestrained power to arrest and charge persons with a violation of ethnic intimidation. See *Lewis v. City of New Orleans* (1973), 415 U.S. 130 (Powell, J., concurring in result). Thus, the determination of whether or not a person should be charged with ethnic intimidation is entrusted to the moment-by-moment judgment of the police in any given situation. See *Kolender, supra.* The statute also furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups who are deemed to merit their displeasure. See *Thornhill v. Alabama* (1940), 310 U.S. 88.

Another aspect affecting whether or not R.C. 2927.12 is constitutional is its infringement on the First Amendment right of freedom of speech. It is fundamental that statutes which regulate First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v.*

Oklahoma (1973), 413 U.S. 601. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that speech which it may legitimately regulate. *City of Houston v. Hill* (1987), 482 U.S. 451. The Supreme Court has consistently held that statutes punishing speech or conduct solely on the ground that they are unseemly or offensive are unconstitutionally overbroad. *Doe v. University of Michigan* (E.D. Mich. 1989), 721 F. Supp. 851.

In *Grayned, supra,* the Supreme Court stated that the cases make it clear that, in assessing the reasonableness of a regulation, a court must weigh heavily the fact that communication is involved. As a result, the regulation must be narrowly tailored to further the state's legitimate interests. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, and that particular expressive activity cannot be prohibited because of a desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. See *Tinker v. Des Moines School Dist.* (1969), 393 U.S. 503.

The Supreme Court has applied the overbreadth doctrine in the First Amendment area when the challenged law has had a "chilling effect" on constitutionally preferred liberties. *Dombrowski v. Pfister* (1965), 380 U.S. 479; *NAACP v. Button* (1963), 371 U.S. 415; *Thornhill, supra.* Freedom of speech is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. *Staub v. City of Baxley* (1958), 355 U.S. 313.

Appellant asserts that R.C. 2927.12 does not regulate speech but, rather, enhances the penalty for unlawful conduct committed for an improper motive or purpose, *i.e.,* because of the race, color, national origin or religion of a person or group of persons. Appellant asserts that an individual cannot be charged with ethnic intimidation unless he has already committed unlawful conduct by committing one of the enumerated crimes contained in the statute and, thus, speech is not curtailed. This court disagrees. What

the ethnic intimidation statute is punishing by enhancement of the penalty for the listed criminal offenses is the spoken or written word or expression thereof by conduct.

In *Texas v. Johnson* (1989), 109 Sup. Ct. 2533, 2544, the court stated:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. * * * "

In *Board of Education v. Barnette* (1943), 319 U.S. 624, at 642, the court stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. * * * "

In *Terminiello v. Chicago* (1949), 337 U.S. 1, the Supreme Court stated that a principal function of free speech under our system of government is to invite dispute. Free speech may indeed thus serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Merely advocating force does not remove speech from the protection of the First Amendment. *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886. While the underlying conduct, *i.e.*, assault, menacing threats and the like, are crimes and may be punished, the government may not, by enhancing penalties, prohibit expression simply because it disagrees with its message. *Johnson, supra.*

This court finds that R.C. 2927.12 is unconstitutional on its face. The statute makes a crime out of what, under the constitution, cannot be a crime since it is aimed directly at activity protected by the constitution. The First and

Fourteenth Amendments do not permit a state to make criminal the exercise of the right of speech or conduct simply because its exercise may be annoying or offensive. *Coates v. City of Cincinnati* (1971), 402 U.S. 611. Further, because speech or conduct can be used to show the motivation behind a person's actions, a finding of guilt under R.C. 2927.12 is based on an undifferentiated mix partially for what is said and partially for what is illegally done and, as such, a conviction under the statute cannot stand. *Cleveland v. Mechanic* (1971), 26 Ohio App. 2d 138. See, also, *State v. Johnson* (1982), 6 Ohio App. 3d 56.

In most instances, the words or conduct of a person charged with ethnic intimidation will be the only indicia of his attitude or opinion on a subject, and this attitude or opinion is inseparably intertwined with the content of the statements or the conduct. Also, in most cases, it will solely be because of what a person says or what a person does that the police will perceive that a person's actions were motivated by the race, color, religion or national origin of another person or group of persons. Further, in most cases, it will be clear that, but for the remarks or the conduct, the individual would not be charged with ethnic intimidation, although he could be charged with the underlying crimes. The First Amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby. See *Tygrett v. Washington (1974)*, 543 F. 2d 840.

In *City of Cincinnati v. Black* (1966), 8 Ohio App. 2d 143, 146-147, the court, in holding that an ordinance which made it a crime to sell, offer for sale, or give away a pamphlet or paper which contained an article subjecting to ridicule or contempt any class or group of citizens on account of race, religious belief, or which in any manner tends to promote racial hatred or religious bigotry unconstitutional, stated:

> "It is thus seen that the ordinance undertakes to control the extent of free expression in the fields of religious and political affairs, two fields which

> have been given the widest possible latitude by constitutional interpretation; and also in the field of race relations which, while not written directly into either the federal or state Constitutions, has nevertheless in present day society, by judicial interpretation of the Fourteenth Amendment and by legislative enactment, received wide-spread public attention.
>
> The ordinance makes it an offenses to communicate hatred and bigotry in the fields of race and religion. Bigotry and hatred reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to the special commandment 'that ye love one another,' but no means has as yet been found or attempted to compel this highly commendable viewpoint by law. Obviously any attempt to do so would border very closely on thought control which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know."

This court finds that this sentiment is equally applicable in the instant case. The constitutional protection of the First Amendment does not depend upon the truth, popularity or social utility of the ideas and beliefs put forward. *Craig v. Harney* (1947), 331 U.S. 367. Where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a court will take the extraordinary step of enjoining the state prosecution. *Dombrowski, supra.*

This court recognizes that, by holding R. C. 2927.12 unconstitutional, we have struck down a statute that deals with an extremely significant problem in our society. The concern of citizens with criminal activity motivated by the race, color, religion or national origin of another person or group of persons is certainly a matter requiring the attention of all branches of government. However, as weighty as this concern may be, it cannot justify legislation that would

otherwise fail to meet constitutional standards for definiteness and clarity. While the objective of the legislation cannot be questioned and the conduct sought to be punished is reprehensible, R.C. 2917.12 in its sweeping reach and its imprecise method of enforcement is incompatible with due process requirements. These constitutional considerations may not be dismissed merely because there is a laudatory legislative end sought to be achieved. See *State v. Young* (1980), 62 Ohio St. 2d 370, certiorari denied *Ohio v. Young* (1980), 449 U.S. 905.

Therefore, based on the foregoing, this court finds that the trial court did not err in determining that R. C. 2927.12 was unconstitutional. The statute allows arbitrary and discriminatory action by police, prosecutors, courts and juries permitting them on a case-by-case basis, to subjectively determine whether the conduct or speech or action before them violates the statute. It does not provide fair warning to a person of ordinary intelligence that contemplated conduct will violate the statute because it is overbroad and violates the First Amendment right to free speech and conduct. Accordingly, appellant's assignment of error is not well taken and is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and KLINE, JJ., concur

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

FILED, March 28, 1990

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
	:	
PLAINTIFF	:	
	:	CASE NO. 89-CR-11-5166
VS.	:	A,B,C,D,E,F,G
	:	
CLANCY VAN GUNDY, ET AL	:	JUDGE WEST
	:	
DEFENDANTS	:	

ENTRY DISMISSING COUNTS TWO THROUGH EIGHT OF THE INDICTMENT

For the reasons set forth in my opinion filed this date, Defendants' Motion to Dismiss the indictments against all defendants as set forth in Counts Two through Eight of the Indictment is hereby granted. The indictment against Clancy Van Gundy as to Count One shall stand.

West
JUDGE

Approved:

Arnold S. White
Arnold S. White (Whi02)

Harold E. Wonnell (per tel 3/26/90)
Harold E. Wonnell (Won01)

Samuel B. Weiner (per tel 3/26/90)
Samuel B. Weiner (Wei05)

Andrew E. Lyles (per tel 3/26/90)
Andrew E. Lyles (Lyl04)

Thomas M. Tyack (per tel 3/26/90)
Thomas M. Tyack (Tya01)

Carol Schneider (per tel 3/28/90)
Carol Schneider

Edward W. Morgan as to form only (per tel 3/26/90)
Edward M. Morgan (Mor03)

FILED, March 28, 1990

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
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PLAINTIFF	:	
	:	CASE NO. 89-CR-11-5166
VS.	:	A,B,C,D,E,F,G
	:	
CLANCY VAN GUNDY, ET AL	:	JUDGE WEST
	:	
DEFENDANTS	:	

OPINION

This matter came on to be heard by written Motions to Dismiss Counts Two through Eight of the Indictments submitted by Defendants Culp, Clancy Van Gundy, and Breedlove and upon the oral motions of the other defendants at hearing, for the reasons advanced by counsel for Culp and Clancy Van Gundy. The Prosecution filed memoranda contra to the written motions and express no opposition to the other defendants joining in the Motions at hearing.

The reasons advanced in the Motions to Dismiss were that the statute on its face violates the First, Sixth and Fourteenth Amendments to the U.S. Constitution and Article One, Section Eleven of the Ohio Constitution. The Court agrees and sustains the Motion to dismiss Counts Two through Eight of the Indictment.

Defendants were indicted in felony Counts Two through Eight for violation of (2927.12 O.R.C. by reason of (2903.21 O.R.C. (a misdemeanor). Motions were filed by various defendants, and the Court set March 14, 1990 as the date for hearing all pending motions, including the Motions to Dismiss. No facts were placed in evidence, and the hearing was based solely on the pleadings and the law.

The law presumes a statute constitutional and Courts are instructed to give the words of a statute their plain meaning when no expression of legislative intent in published. However, where a law is so written that persons "of common intelligence must guess as to its meaning and differ as to its application" it must be struck as void for vagueness. *Connally v. General Construction Co.*, 269 U.S. 385, 391. The Court finds that (2927.12 O.R.C. requires a person of normal intelligence to "speculate as the meaning" of this penal statute. *See State v. Kasnett*, 34 O.S. 193.

The Court notes that the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done "knowingly", does not define "by reason of", and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.

The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if "by reason of" the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so.

The Court also find that this statute is void because of its chilling effect upon First Amendment rights of speech and association. In effect, this statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence.

The indictments as to all the defendants as set forth in Counts Two through Eight are hereby dismissed. Defendant Clancy Van Gundy still stands accused as indicted in Count

One and his trial shall remain set for May 20, 1990. All other motions pending are rendered moot by reason of this opinion.

West

JUDGE

FILED, June 27, 1991

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12239
JAMES B. MAY, JR. Defendant-Appellee	: :	(C.P. #89-CR-4687) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12259
MARK J. STATON Defendant-Appellee	: :	(C.P. #90-CR-660) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12260
AARON L. PLESSINGER Defendant-Appellee	: :	(C.P. #90-CR-660) FINAL ENTRY

. . . . . .

Pursuant to the opinion of this court rendered on the 27th day of June, 1991 the judgment of the trial court is Reversed in part and Affirmed in part and Remanded to the trial court for further proceedings.

R K Wilson

RICHARD K. WILSON, Judge

James A. Brogan
JAMES A. BROGAN, Judge

Thomas J. Grady
THOMAS J. GRADY, Judge

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Hon. John W. Kessler
Judge - Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45402

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12239
JAMES B. MAY, JR. Defendant-Appellee	:	(C.P. #89-CR-4687) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12259
MARK J. STATON Defendant-Appellee	:	(C.P. #90-CR-660) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12260
AARON L. PLESSINGER Defendant-Appellee	:	(C.P. #90-CR-660) FINAL ENTRY

. . . . . .

OPINION

Rendered on the 27th day ofJune 1991

. . . . . .

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Attorney for Aaron L. Plessinger

. . . . . .

BROGAN, J.

This appeal encompasses three separate cases pursuant to the granting of a motion for consolidation made by the appellate, the State of Ohio, based on the fact that all three cases involve the same issue, whether R.C. 2927.12(A) is constitutional.

The appellant raises one assignment of error in which it contends that the trial court erred, in each of the cases, in holding that Section 2927.12(A) of the Ohio Revised Code is unconstitutional and in subsequently dismissing the charges against each defendant, the appellees herein.

In the case of James B. May, Jr., on December 26, 1989 at approximately 1:00 a.m., the Dayton Police were dispatched to 328 Warren Street, Dayton, Ohio on a complaint from Mr. Gregory Crawford that May and several other white men were threatening Crawford and his friends, screaming racial slurs at them. One person in May's group had a gun. When the police arrived, they heard loud voices and screams inside the building. May, who was the landlord, stated that he and his companions came in for two purposes: one (1), to tell Crawford to turn off his space heater and two (2), to check the broken windows in the building. May further stated that a black male exited Crawford's room with a kitchen knife, but was pulled back in by another black male. Crawford claimed that May's son, who was with May, threatened him

with a gun and that another man, Robert Amann, threatened Crawford and his friends with a tire iron and that May's group made racial slurs against Crawford and his friends. Subsequently, May, his son and Amann were arrested.

In the cases of Mark J. Staton and Aaron L. Plessinger, on February 8, 1990 at approximately 11:25 p.m., the Dayton Police were dispatched to 515 Sheridan, Dayton, Ohio on a disturbance call. This was the residence of Jessie and Dianne Bowlin. Mr. Bowlin, who is white, had two black visitors in his home. Three neighbors, including Staton and Plessinger, began yelling racial slurs at Bowlin's visitors and called Mr. Bowlin a "nigger lover". The men threatened the lives of Bowlin and his guests and threw a rock through Bowlin's front window. When the police arrived, the three men ran off. A car belonging to one of Bowlin's guests was also damaged by the three men. After some investigation, both Plessinger and Staton were arrested.

In each instance, the Montgomery County Grand Jury returned an indictment charging each defendant with one (1) count of aggravated menacing in violation of R.C. 2903.21 by reason of the race and/or color of the victims in violation of R.C. 2927.12.

On May 8, 1990, May filed a motion to dismiss. The trial court granted the motion on May 15, 1990, finding:

> This Court finds pursuant to *Petrillo, supra,* that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 using an authorized, defined culpable mental state for the additional element of the offense. This Court finds that "by reason of" as used in Ohio Revised Code §2927.12 described no statutorily cognizable mental state, as required by Ohio Revised Code §2901.21 for an element of the offense, and is, therefore, impermissibly constitutionally vague under Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

> Further, vagueness of constitutional proportion arises in Ohio Revised Code §2927.12 because the language of the act does not sufficiently specify the relationship of the race, et cetera of the other "person or group of persons" to the actor or victim. It would be quite clear if the conduct of the offender was based on the *victim's* race, color, religion, et cetera; or upon a member of the *victim's immediate family*, as is the style used in the menacing statutes (Ohio Revised Code §2903.21 and .22). (emphasis added). As presently worded, however, the statute leaves to speculation who or what group is subject to official attention. Other than specifying that the action of the offender be by reason of race, et cetera of *another* person or group, no further relationship criteria are stated, leaving one to guess as to its application.
>
> Again, this Court finds that the legislature could have, and should have drafted Ohio Revised Code §2927.12 clearly defining the relationship of the persons or group to the victim of the intimidation. The failure to do so renders the statute unconstitutionally vague, in violation of Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

On May 21, and May 30, 1990, Plessinger and Staton filed motions to dismiss based on the *May* decision and these motions were sustained on May 24 and May 31, 1990, respectively. It is from these decisions and the decision in the *May* case that appellant appeals.

It is appellant's contention that R.C. 2927.12 is constitutional and that therefore it was error on the part of the trial court to find the section unconstitutional. We disagree.

R.C. 2927.12 states:

"(A) No person shall violate section 2903.21

> [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The trial court found this section to be unconstitutional on vagueness grounds. In order to find a statute unconstitutional, it must be proven *beyond a reasonable doubt.* Proof beyond a reasonable doubt is necessary due to the strong presumption of constitutionality for statutes designed to promote the public health, safety and welfare. *State v. Anderson* (1991), 57 Ohio St.3d 168. In *Anderson,* the court stated:

> In order to prove such an assertion, the challenging party must show that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all: * * * " *Coates v. Cincinnati* (1971), 402 U.S. 611, 614. In other words, the challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law.

While the Due Process Clause of the Fourteenth Amendment requires that there be reasonable definiteness in the language of a statute, it will not be void for vagueness simply because it could be stated more precisely. *Roth v. United States* (1957), 354 U.S. 476. The Franklin County Court of Appeals, in addressing the same issue, found R.C. 2927.12

to be unconstitutionally vague on the grounds that a person of ordinary intelligence does not have "fair warning as to what conduct is prohibited":

> This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited. The statute states that no person shall violate any one of the enumerated sections " * * * by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, *i.e.*, the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

State v. Van Gundy, et al. (Apr. 16, 1991), Franklin App. No. 90AP- 473, unreported.

We find the reasoning of the Franklin County Court of Appeals to be persuasive, and we affirm the trial court for the reasons articulated in that opinion.

On December 6, 1990, the Delaware County Court of Appeals in *State v. David Wyant* (Dec. 6, 1990), 90CA-2, Delaware App. unreported found the statute was not vague or overbroad and thus not unconstitutional under the Fourteenth Amendment.

Since our opinion in this case is in conflict with the Delaware County Court of Appeals we would entertain a motion to certify this case to the Supreme Court for ultimate resolution of the constitutionality of R.C. 2972.12.

The trial court erred in dismissing the entire charge as the underlying lesser included menacing charge remained for prosecution. The judgment of the trial court is reversed in part and affirmed in part and remanded to the trial court for further proceedings.

. . . . . .

WILSON, J., and GRADY, J., concur.

Copies mailed to:

Lorine M. Reid
Terry L. Lewis
Gary C. Schaengold
Gary W. Crim
Hon. John W. Kessler

FILED, May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,		
Plaintiff,	:	CASE NO. 89-CR-4687/2
-vs-	:	(Judge John W. Kessler)
	:	
JAMES B. MAY, JR.,	:	DECISION AND ORDER SUSTAINING DEFENDANT'S,
Defendant.	:	JAMES B. MAY, MOTION TO DISMISS

: : : : :

This case is before the Court on Defendant's, James B. May, Jr., Motion to Dismiss the indictment charging him with Ethnic Intimidation in violation of Ohio Revised Code §2927.12. Specifically, the indictment alleges that Defendant and two others violated Ohio Revised Code §2903.21 (Aggravated Menacing) vis-a-vis Gregory Crawford, Antonio Goldsmith and Florence Crawford, and that they did so by reason of said individual's race and/or color.

Defendant moves to dismiss on the grounds that Ohio Revised Code §2927.12 is (1) unconstitutionally void for vagueness in violation of the Fourteenth Amendment of the United States Constitution, (2) unconstitutionally denies Defendant equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution, and (3) unconstitutionally denies Defendant his right to free speech in violation of the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

While Defendant's Memorandum in Support of his Motion suffers substantially from the same malady Defendant attributes to Ohio Revised Code §2927.12, the Court concludes that Defendant's specific complaints of vagueness are that no objective tests are provided within the statute

to determine what is meant by the phrase "by reason of"; and that the phrase "another person or group of persons" is far too overbroad.

Vagueness claims are grounded in the constitutional principle announced in *Connally vs. General Construction Co.*, 269 U.S. 385 (1926) wherein the court declared that, as a matter of due process, a law is void on its face if it is so vague that a person "of common intelligence must necessarily guess at its meaning and differ as to its application." Such indefiniteness offends due process because those laws invite arbitrary and discriminatory enforcement, and fail to give persons fair notice of what conduct to avoid. *Columbus vs. Thompson*, 25 Ohio St. 2d 26 (1971); *Papachristou vs. Jacksonville*, 405 U.S. 156 (1972). This Court is mindful, however, of the principle set forth in *United States vs. Harris*, 347 U.S. 612 (1954), to-wit: ". . . If this general class of offenses (to which the statute applies) can be made constitutionally definite by a reasonable construction of that statute, the court is under a duty to give the statute that construction." In *Rose vs. Locke*, 423 U.S. 48 (1975), the court further stated that the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." The Ohio Supreme Court, in *State vs. Dorso*, 4 Ohio St. 3d 60 (1983), cited the aforementioned cases with approval in upholding the constitutionality of Cincinnati's "Loud Musical Noises" ordinance, which prohibited playing music in a manner "to disturb the peace and quiet of the neighborhood . . . " The court made a finding that "the concept of neighborhood and the closeness it implies are well within the ken of the ordinary person."

The only case cited to this Court dealing with interpretation of this particular statute in Ohio is *State vs. Gundy* (Franklin Co. Common Pleas Case No. 89-CR-11-5166, unreported) (1990). Defendant does not refer this Court to any analogous statutes or cases from any other state. In *Gundy, supra*, Judge West condemns Ohio Revised Code §2927.12 because:

1) It does not make clear the interplay between

it and the code sections to which it refers,
2) It does not set forth an acceptable culpable mental state,
3) It does not make clear what must be done knowingly,
4) It does not define "by reason of,"
5) It does not specify to whom the race, color, religion or national origin shall belong.

A predicate finding to vagueness is whether it would have been practical for the legislature to draft the statute more precisely. *U.S. vs. Petrillo,* 332 U.S. 1 (1947). Here, the laudable legislative purpose for Ohio Revised Code §2927.12 is quite clear. The legislature obviously intended to enhance the penalties for certain offenses (Menacing, Aggravated Menacing, Criminal Damaging, Criminal Mischief, and Telephone Harassment) when the offender was motivated by racial, ethnic, or religious hatred or bigotry. Rather than amending the particular offenses for enhanced penalties based on this criteria, as is the statutory scheme with much of Ohio's criminal law, the legislature chose to attempt to enact a new criminal offense, and create an additional element for its commission.

Ohio Revised Code §2901.21 requires that a person is not guilty of an offense unless his liability is based *both on conduct* (a voluntary act or omission) *and culpability for each element* of the offense. (emphasis added) Ohio Revised Code §2901.21(C)(3) further states that, " 'Culpability' means purpose, knowledge, recklessness or negligence as defined in section 2901.22 of the Revised Code." In Ohio Revised Code §2927.12 the only element for the commission of the crime, other than the commission of one of the underlying offenses, is the "reason" (motive) of the actor. The question then is, what cognizable mental state does "by reason of" describe? The closest estimation appears to be "purpose," i.e., the person's "specific intention to engage in conduct of that nature" (Ohio Revised Code §2901.22(A)); but likewise, "knowledge," i.e., the person's awareness that his conduct "will probably be of a certain nature" (Ohio Revised Code §2901.22(B)), can definitionally apply. Unfortunately, as is

discussed in Ohio Jury Instructions 409.01(7), rather than being an element, "The presence or absence of motive is one of the circumstances bearing on purpose or knowledge." The comment to this section suggests that "motive is the subjective inducement or reason that prompted the purpose."

This Court finds pursuant to *Petrillo, supra,* that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 using an authorized, defined culpable mental state for the additional element of the offense. This Court finds that "by reason of" as used in Ohio Revised Code §2927.12 describes no statutorily cognizable mental state, as required by Ohio Revised Code §2901.21 for an element of the offense, and is, therefore, impermissibly constitutionally vague under Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Further vagueness of constitutional proportion arises in Ohio Revised Code §2927.12 because the language of the act does not sufficiently specify the relationship of the race, et cetera of the other "person or group of persons" to the actor or victim. It would be quite clear if the conduct of the offender was based on the *victim's* race, color, religion, et cetera; or upon a member of the *victim's immediate family,* as is the style used in the menacing statutes (Ohio Revised Code §2903.21 and .22). (emphasis added) As presently worded, however, the statute leaves to speculation who or what group is subject to official attention. Other than specifying that the action of the offender be by reason of the race, et cetera of *another* person or group, no further relationship criteria are stated, leaving one to guess as to its application.

Again, this Court finds that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 clearly defining the relationship of the persons or group to the victim of the intimidation. The failure to do so renders the statute unconstitutionally vague, in violation of Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Given these findings, this Court need not reach Defendant's other claims against the statute.

Defendant's Motion is well taken. This case against Defendant is ordered DISMISSED.

SO ORDERED:

J. W. Kessler

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: Richard D. Hanes)

Terry L. Lewis, Attorney for Defendant, Suite 500, 111 West First Street, Dayton, Ohio 45402

Tim Walker, Bailiff

FILED, May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 90-CR-660
-vs-	:	(Judge John W. Kessler)
	:	
MARK J. STATON,	:	DECISION AND ORDER
Defendant.	:	SUSTAINING DEFENDANT'S,
	:	MOTION TO DISMISS

:::::

This case is before the Court on Defendant's Motion to Dismiss the charge of Ethnic Intimidation, in violation of Ohio Revised Code 2927.12. For the reasons stated in this Court's decision reference James B. May, Jr.,'s motion to dismiss on identical grounds (89-CR- 4687), Defendant's Motion is found well taken and is hereby SUSTAINED.

SO ORDERED:

_____

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: Richard D. Hanes)

Victor A. Hodge, Attorney For Defendant, 367 West Second Street, Suite 110, Dayton, Ohio 45402

Tim Walker, Bailiff

FILED May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 90-CR-660
-vs-	:	(Judge John W. Kessler)
AARON LEE PLESSINGER,	:	DECISION AND ORDER SUSTAINING DEFENDANT'S
Defendant.	:	MOTION TO DISMISS

: : : : :

This case is before the Court of Defendant's Motion to Dismiss the charge of Ethnic Intimidation, in violation of Ohio Revised Code §2927.12. For the reasons stated in this Court's decision reference James B. May, Jr.'s motion to dismiss on identical grounds (89-CR-4687), Defendant's Motion is found well taken and is hereby SUSTAINED.

SO ORDERED:

_____

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: James R. Levinson)

Ted Rice, Attorney for Defendant, 301 W. Third Street, Dayton, Ohio 45422

Assignment Office

Tim Walker, Bailiff

OHIO REVISED CODE § 2901.22 Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from the due car, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

OHIO REVISED CODE §4112.02 (H) Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(2) Represent to any person that housing is not available for inspection, sale, or rental when in fact it is available, because of race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring assigning, renting, leasing, or subleasing any housing or in furnishing facilities, service, or privileges in connection with the ownership, occupancy, or use of any housing, including the sale of fire, extended coverage, or homeowners insurance, because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the

neighborhood in which the housing is located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, ancestry, handicap, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing. Any person may make inquiries, and make and keep records concerning race, color, religion, sex, ancestry, handicap, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a

housing listing sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any person in the terms or conditions of such access, membership, or participation on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (h) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic composition of the block, neighborhood, or area;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry,

handicap, or national origin of any prospective owner or user of such lot.

18 USCS § 242 Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 USCS § 243 Exclusion of jurors on account of race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection of summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

18 USCS § 245 Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in

this section shall be undertaken by the United States, except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this section shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with-

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election,

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been-

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit,

service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, serv ices, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which served the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial

portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate-

shall be fined not more than $1000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if

such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of the State, who is empowered by law to conduct investigations of, or make arrests because of offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(d) For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

42 USCS § 2000c-6(a) Civil actions by the Attorney General

(a) Complaint; certification; notice to school board or college authority; institution of civil action; relief request; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants. Whenever the Attorney General receives a complaint in writing-

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the

> effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board of authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower an official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to grant of effective relief hereunder.

Respectfully submitted,

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COUNSEL OF RECORD
FOR STATE OF OHIO

Supreme Court, U.S.
F I L E D
OCT 21 1992
OFFICE OF THE CLERK

No. 92-568

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,
Petitioner,
v.
DAVID WYANT,
Respondent.

STATE OF OHIO,
Petitioner,
v.
JAMES MAY, JR., et. al.,
Respondent.

STATE OF OHIO,
Petitioner,
v.
CLANCY VAN GUNDY, et. al.,
Respondent.

BRIEF IN OPPOSITION TO THE STATE OF OHIO'S PETITION FOR A WRIT OF CERTIORARI SUBMITTED ON BEHALF OF RESPONDENT ROBERT ERIC BLAZER, CODEFENDANT IN STATE OF OHIO vs. CLANCY VAN GUNDY, et. al.

Allen V. Adair
Franklin County Public
Defender's Office
373 South High Street
Twelfth Floor
Columbus, Ohio 43215
Phone: 614-462-3960

Counsel for Respondent
Robert Eric Blazer

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 2927.12 of the Ohio Revised Code, increasing the penalty for certain offenses when the offender was motivated by bias, violates the First Amendment of the United States Constitution by impermissibly punishing the content of speech.

2. Whether Section 2927.12 of the Ohio Revised Code is unconstitutionally vague, thus denying due process, and whether it works to deny equal protection of the law, both contrary to the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

The immediate parties to the prosecution involving respondent Robert Blazer are the State of Ohio, herein represented by the Ohio Attorney General as counsel of record, and codefendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Bryan Krebs, Charles Culp and Terry Breedlove, Jr. Parties to the companion cases are as indicated in the petition.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-568

STATE OF OHIO,
Petitioner,
v.
DAVID WYANT,
Respondent.

STATE OF OHIO,
Petitioner,
v.
JAMES MAY, JR., et. al.,
Respondent.

STATE OF OHIO,
Petitioner,
v.
CLANCY VAN GUNDY, et. al.,
Respondent.

BRIEF IN OPPOSITION TO THE STATE OF OHIO'S PETITION FOR A WRIT OF CERTIORARI SUBMITTED ON BEHALF OF RESPONDENT ROBERT ERIC BLAZER, CODEFENDANT IN STATE OF OHIO vs. CLANCY VAN GUNDY, et. al.

Respondent Robert Blazer respectfully requests that a writ of certiorari not issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on August 26, 1992. In addition to the First Amendment issue which was the basis for the decision of the Supreme Court of Ohio, respondent advances additional grounds, briefed and argued in the Ohio courts, supporting the decision in his favor.

OPINIONS BELOW

Respondent Robert Blazer was one of seven codefendants in the prosecution styled State of Ohio v. Van Gundy, et. al. The opinion of the Supreme Court of Ohio relates to this and two companion cases and is published as State v. Wyant, 64 Ohio St. 3d 566, ___ N.E. 2d ___ (1992). The opinion of the Court of Appeals of Ohio, Tenth Appellate District (Franklin County) is unpublished, as is the decision of the trial court, which was the Franklin County Court of Common Pleas. All three opinions are included in the appendix.

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. Section 1257(3). Petitioner's invocation of 28 U.S.C. Section 1257(a) appears erroneous. The petition has been filed in a timely manner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The statute at issue is Ohio Revised Code Sec. 2927.12:

> "(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

(2) The predicate offense for which respondent was prosecuted was aggravated menacing, defined as followed by Section 2903.21 of the Ohio Revised Code:

> "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.
> "(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

(3) The First Amendment to the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

(4) Article I, Section 11 of the Ohio Constitution provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

(5) Section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

> "...nor shall any State deprive any person of life. liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent Blazer was one of seven codefendants, each charged with seven counts of ethnic intimidation. The substance of the charges was that "by reason of the race, color, religion or national origin" of each of the named victims, each defendant

had caused the victim to believe that the defendants, individually or collectively, would cause them to suffer serious physical harm. Each count constituted a felony of the fourth degree, carrying a potential prison term of up to eighteen months, which, if run consecutively, could total as much as ten and one-half years of imprisonment. Only codefendant Clancy Van Gundy was charged with the additional offense of felonious assault. Because there was no trial in this case the facts giving rise to charges are not a matter of record, though it may be inferred from the indictment that there was a confrontation between two groups of people and that one of the codefendants assaulted one of the alleged victims.

Respondent Blazer, along with the other defendants, moved to dismiss on constitutional grounds. Following a hearing on March 14, 1990, the judge ruled in respondent's favor and subsequently issued an opinion, stating in part:

> "***the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (Sec.) 2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done 'knowingly', does not define 'by reason of', and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.
>
> "The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if 'by reason of' the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so."

After further noting the probable chilling effect of the statute upon First Amendment rights of speech and association, the court dismissed the ethnic intimidation counts as to all of the defendants. The felonious assault count against Clancy Van Gundy remained and Mr. Van Gundy has since been convicted of that charge.

The Court of Appeals affirmed the judgment of the trial court in an opinion rendered April 16, 1991. As did the trial court, the Court of Appeals found the statute void for vagueness under the Due Process Clause of the Fourteenth Amendment in that it failed to give a person of ordinary intelligence fair warning as to what conduct is prohibited, and because it encouraged arbitrary and discriminatory enforcement. The court also found R.C. 2927.12 infringed upon free speech as guaranteed by the First Amendment. It did not address the Equal Protection argument briefed by counsel.

The case was certified to the Supreme Court of Ohio to be considered together with cases from two other counties. Before the state supreme court claims were advanced that: (1) the ethnic intimidation statute was unconstitutionally vague, (2) that it infringed upon First Amendment rights, (3) that it was unconstitutionally overbroad, (4) that, applying equal protection considerations, it did not serve a compelling state interest, (5) that the statute could not be saved by application of a presumption of constitutionality, and (6) that it could not be saved by a narrowing interpretation. Other parties advanced

similar arguments. The decision of the Supreme Court of Ohio was rendered August 26, 1992, approximately two months after the issuance of this court's decision in R.A.V. v. City of St. Paul, Minnesota 505 U.S. ___, 112 S. Ct. 2538. The decision addressed only the First Amendment issue and affirmed the judgment of the lower courts.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The decision of the Supreme Court of Ohio is consistent with this Court's decision in R.A.V. v. City of St. Paul, Minnesota.

A. The Ohio Statute

Petitioner attempts to distinguish the Ohio ethnic intimidation statute from the St. Paul ordinance reviewed in R.A.V. v. City of St. Paul, Minnesota, 505 U.S. ___, 112 S. Ct. 2538 (1992), essentially arguing that the Ohio statute merely provides an enhanced penalty for conduct already criminalized, while the ordinance created a separate substantive offense aimed at a particular kind of conduct. This is at odds with this Court's view of the St. Paul ordinance: the R.A.V. opinion observes that the conduct in question could have been punished under a number of other laws, listed in a footnote. 112 S. Ct. at 2541 and fn. 1. While the Ohio statute does establish an increased penalty for conduct proscribed by other statutes, it does so by defining a new substantive offense, which incorporates by reference the elements of the lesser offenses, and adds the element that the offense committed was motivated by bias. Thus, the substance of the Ohio statute is identical for purposes of

constitutional review to the St. Paul ordinance, as it creates a "thought crime," in the words of the Ohio Supreme Court, or one improperly based on the content of speech following this Court's analysis in R.A.V.

Section 2927.12 of the Ohio Revised Code states:

> "(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

Since no culpable mental state is specified, it would appear that by operation of Section 2901.21 of the Ohio Revised Code, the mens rea requirement as to the element of motivation for the underlying offense is either strict criminal liability or recklessness.[1]

The underlying offense for the seven counts of ethnic intimidation on which respondent was indicted was aggravated menacing, defined as follows by Revised Code Section 2903.21:

> "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the

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[1] Section 2901.22 of the Revised Code defines four culpable mental states (purposely, knowingly, recklessly, and negligently) and allows for strict criminal liability. Section 2901.21(B) provides: "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

person or property of such other person or member of his immediate family.

"(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

Briefs submitted in the state courts variously argued that the knowingly mens rea element carried over to the greater offense or that recklessness was sufficient as to the motive element, this being relevant to one of the arguments that the statute failed to provide an ascertainable standard of guilt and was thus unconstitutionally vague.

B. The Decision of the Ohio Supreme Court

In construing the Ohio statute, this Court is bound by the construction given it by the Ohio Supreme Court. R.A.V. v. City of St. Paul, Minnesota, supra, 112 S. Ct. at 2542, citing Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986); New York v. Ferber, 458 U.S. 747, 769, fn. 24 (1982); Terminello v. Chicago, 337 U.S. 1, 4 (1949). The syllabus setting forth the holding of the Ohio Supreme Court in the present case states:

"The effect of R.C. 2927.12 is to create a 'thought crime,' in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution."[2]

In reaching this conclusion, the court examined both the aggravated menacing and ethnic intimidation statutes and concluded: "...The (ethnic intimidation) statute specifies no

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[2] Under Ohio law, the syllabus to an Ohio Supreme Court opinion states the holding of the court.

additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive." State v. Wyant, 64 Ohio St. 3d 566, 571 (1992).[3] The issue to be decided by the court was "...whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime." Id.

The Court at some length distinguished motive from criminal intent, concluding that while motive might be evidence of intent, motive by itself was not otherwise an element of offenses defined by the Ohio Revised Code. Where the code elsewhere provided for an enhanced penalty based on aggravating circumstances, the basis was "an additional act or intent" and not whatever may have motivated the offender to act as he did. Id. at 574. Looking to state and federal anti-discrimination laws, the Court concluded that it was the discriminatory treatment or acts which were to be punished and not the bigotry leading to those acts. Id. at 575. The court went on to find that by punishing a person for their

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[3] The petition, submitted by the Ohio Attorney General, who before his election to that position had been the sponsor of the enacting legislation in the Ohio General Assembly, does not dispute this analysis. At page eight the petition states: "...A person may think or say anything they want, no matter how deplorable, and may do so without fear of punishment. Only when that motivates otherwise criminal conduct may that person be charged under Ohio law. Then any thought behind the act 'is swept up incidentally' within the conduct involved. The conduct of the person, thus, is not 'shielded from regulation' by the fact the actor had a discriminatory idea or philosophy behind commission of the act."

motives, the ethnic intimidation statue punished thought, which was protected by the First Amendment. Following discussion of West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Beauharnais v. Illinois, 343 U.S. 250 (1952) and additional cases, the court concluded:

> "Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea." 64 Ohio St. 3d at 578.

Comparing the Ohio statute to the ordinance struck down in R.A.V. and a Wisconsin statute, comparable to, though not as vaguely drafted as the Ohio statute, which was recently struck down by the Wisconsin Supreme Court,[4] the Ohio Supreme Court stated:

> "R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin 'hate crimes' laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions." 64 Ohio St. 3d 579.[5]

As discussed briefly under division II below, the Court did not address additional issues raised by respondents. The decision of the Ohio Supreme Court was unanimous, as was the decision of the Court of Appeals in State v. Van Gundy, et. al.

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[4] State v. Mitchell ___ Wis. ___, 485 N.W. 2d 807 (1992).

[5] From this passage, as well as other portions of the opinion, it is clear that the Ohio Supreme Court did not construe the statute as reaching only "fighting words."

C. Wyant and R.A.V. Compared

While the decision of the Ohio Supreme Court was issued after this court's decision in R.A.V. v. City of St. Paul, Minnesota and makes reference to R.A.V., the Ohio court's decision rests upon its independent review of Ohio law and applicable constitutional principles and not the conclusion that the holding was compelled by this Court's decision. There is no inconsistency between the decisions. Perhaps the Ohio court had the easier task because it was not bound by characterization of the statute as applying only to unprotected speech - so called "fighting words." In addition, the Court's distinction between motive and intent under Ohio law served as the foundation for its holding.

The issue of underinclusiveness was not addressed by the Ohio Supreme Court, thougn it was touched upon in the lower courts in connection with due process and equal protection claims. It is beyond reason that the Ohio ethnic intimidation statute provides an increased penalty, based on motive, for menacing conduct (itself usually manifested by speech or expressive conduct), but not for the assault it must be proved the victim of menacing or aggravated menacing subjectively believed he would suffer. In any event, the view of the majority in R.A.V. was that "...the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech"

(112 S. Ct. at 2545), and it is content discrimination that was the basis of the decision of the Ohio Supreme Court.

II. The Ohio ethnic intimidation statute is constitutionally defective on additional grounds not addressed by the Supreme Court of Ohio.

The Ohio Supreme Court chose to address only the First Amendment issue:

> "The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the concurring opinion by Justice White in R.A.V. v. St. Paul, supra...However, because of our holding we need not address these challenges. 64 Ohio St. 3d 579-580.

The trial court had sustained a motion to dismiss on all of these grounds. The opinion of the intermediate court of appeals focused on the First Amendment and vagueness issues, finding both compelling.

Because of the interrelationship among the issues, much of what respondent advanced in the lower courts in support of vagueness, overbreadth and equal protection claims is echoed in this Court's decision in R.A.V., and, to a lesser extent, in the opinion of the Ohio Supreme Court.

Vague laws make it difficult for both the citizen who must conform his conduct to the requirements of the law and for those authorities charged with enforcement, which must be uniform to be fair. Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Ohio's ethnic intimidation statute is unconstitutionally vague for a number of reasons. Related to the First Amendment arguments, the statute's vagueness contributes to its overbreadth: it fails to adequately distinguish between constitutionally protected expression and that falling within the narrow exception made for fighting words, thus allowing punishment of protected speech. The statute fails to specify whether the victim must be of a different race, color, religion, or national origin that the defendant, as do statutes in other jurisdictions.[6] The Ohio law fails to specify a scienter requirement as to the motive element, making it uncertain whether the mens rea element of the underlying offense carries over to the greater offense, or whether recklessness or strict liability applies, neither of which is appropriate when First Amendment rights are at stake. (See fn. 1 above.) Not only the police and members of the public at large are left without guidance. These shortcomings also create great practical difficulties for both a defendant, who must prepare to defend at trial, and for the court, which is given no guidance as to how the jury must be instructed.

The gist of the equal protection argument was that to increase the penalty for a criminal offense merely because the offender is a bigot is a denial of equal protection, as a

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[6] Compare Oregon Revised Statutes Sec. 166.165(1)(a)(A), New York Penal Law Sec 240.30(3) and Michigan Comp. Laws Ann. Sec. 750.147b, all of which explicitly refer to the race, religion, color, gender or national origin of the victim.

compelling state interest is not served by the differential treatment. Essentially the same rationale was followed by this Court in determining that the municipal ordinance in R.A.V. improperly penalized speech based upon its content.

Should the petition be granted, respondent asks that the parties also be directed to address the vagueness and equal protection issues.

III. Remaining Issues Raised by the Petition

Petitioner urges the Court to square the opinion of the Ohio Supreme Court with the decision in Dawson v. Delaware, 503 U.S. ___, 112 S. Ct. 1093, 117 L.Ed. 2d 309. Dawson involved consideration of the defendant's membership in the Aryan Brotherhood at the sentencing phase of a death penalty trial. The Court found this was not relevant to any of the aggravating factors, enumerated by statute, or to rebut any of the mitigation advanced. In circumstances where such evidence would be relevant, the Court concluded that the First and Fourteenth Amendments did not erect a per se barrier to introduction of evidence as to membership in a racist organization. Should Ohio's ethnic intimidation statute be upheld, or should some related provision be found to pass constitutional muster, Dawson would be instructive as to the admissibility of evidence proving bias on the part of the offender. However, it does not bear upon the determination whether or not such statutes infringe upon rights protected by the First Amendment.

As to the final issue raised by the petition, while respondent does not strenuously argue that the decision of the Ohio Supreme Court rests on independent state grounds, this court's attention is directed to the following paragraph in the opinion:

> "The freedoms of speech, press, religion and assembly are guaranteed in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to 'speak, write, and publish his sentiments on all subjects.' It follows that a citizen of Ohio is free to <u>have</u> 'sentiments on all subjects.'" 64 Ohio St. 3d 577.

This suggests the possibility that were this court to conclude that the statute was acceptable under the First Amendment, the Ohio Supreme Court might still conclude it was in violation of the state Constitution.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE, *v.* WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT, *v.* MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT, *v.* STATON ET AL., APPELLEES.

THE STATE OF OHIO, APPELLANT, *v.* VAN GUNDY ET AL., APPELLEES.

[Cite as *State v. Wyant* (1992), 64 Ohio St.3d 566.]

Criminal law—Ethnic intimidation—R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

See: West's Ohio Digest, Extortion and Threats ⇐25.

(Nos. 91-199, 91-1519 and 91-1211/91-1589—Submitted April 15, 1992—Decided August 26, 1992.)

APPEAL from the Court of Appeals for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477, 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else, and so he rented L-18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A park official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant.

Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the state, the court of appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware App. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. See *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*, certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.

Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.

Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.

Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric A. Walker* as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91-1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91-199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart; Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No. 91-199.

Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order of Police and Buckeye State Sheriff's Association in case No. 91-199.

Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, city of Columbus in case Nos. 91-1211/91-1589.

Jones, Day, Reavis & Pogue, Steven T. Catlett and *Richard A. Cordray; Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft; Ruth L. Lansner, Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.

Alphonse A. Gerhardstein, urging reversal for *amici curiae*, Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

HERBERT R. BROWN, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society-threatening problem. However, the legislative response to this problem must not violate the Ohio and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I

The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering (R.C. 2909.06),[3] criminal mischief (R.C. 2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], or [5]).[5]

The predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus the enhanced penalty must be for something more

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1. R.C. 2903.21 (aggravated menacing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

2. R.C. 2903.22 (menacing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

3. R.C. 2909.06 (criminal damaging or endangering) reads in part:
"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:
"(1) Knowingly, by any means;
"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

4. R.C. 2909.07 (criminal mischief) reads in part:
"(A) No person shall:
"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

5. R.C. 2917.21 (telephone harassment) reads in part:
"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:
"* * *
"(3) During the telephone call, violates section 2903.21 of the Revised Code;
"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;
"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318–324; see, also, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C–890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

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6. Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's state of mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psycopath, on the other hand, may intend to kill and yet have no motive.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more

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7. The Ohio statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

8. Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can

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9. The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code.

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

10. LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes as *not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

increase the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C

Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way

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11. R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"* * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and "disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335–336, 97 S.Ct. 1843, 1854–1855, 52 L.Ed.2d 396, 415, fn. 15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265–266, 97 S.Ct. 555, 563–564, 50 L.Ed.2d 450, 464–465. It is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*. "* * * Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs, supra*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12]

12. The First Amendment to the United States Constitution reads:

Federal First Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234–235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

"[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565–566, 89 S.Ct. 1243, 1248–1249, 22 L.Ed.2d 542, 550, stated as follows:

"* * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

"* * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[13] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 11, Article I of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

13. The parties do not contest that the predicate offenses are punishable.

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to *have* "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)? [14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly—and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the

14. As Judge West of the Franklin County Court of Common Pleas said:

"[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported.

First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Local Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas, J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

"* * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564: "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law. *R.A.V. v. St. Paul* (1992), 505 U.S. ——, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads:

"'Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.'" *Id.*, 505 U.S. at ——, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct; that is, conduct which will arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ——, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on

content. The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), — Wis.2d —, —, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis.Stat. 939.645 (1989–90). Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought." *Id.* at —, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra*, 505 U.S. at —, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the concur-

ring opinion by Justice White in *R.A.V. v. St. Paul, supra*, 505 U.S. at ——, 112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case Nos. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgments accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, J., of the First Appellate District, sitting for SWEENEY, J.

State of Ohio, Plaintiff-Appellant, v. Bryan Krebs, Defendant-Appellee.	:	No. 90AP-478 (REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant, v. Charles Culp, Defendant-Appellee.	:	No. 90AP-479 (REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant, v. Terry Breedlove, Jr., Defendant-Appellee.	:	No. 90AP-480 (REGULAR CALENDAR)

O P I N I O N

Rendered on April 16, 1991

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellant.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)

WONNELL, JANES & WONNELL, and MR. HAROLD WONNELL, for appellee Clancy Van Gundy.

MR. ANDREW LYLES, for appellee Casey Van Gundy.

MR. SAMUEL WEINER, for appellee Franklin Clay.

MR. JAMES KURA, Public Defender, and MR. ALAN V. ADAIR, for appellee Robert Eric Blazer.

MR. DANIEL T. KOBIL, for appellee Charles Culp, Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, and Bryan Krebs.

MS. SUSAN B. GELLMAN; WHITE & STOREY, and MR. ARNOLD WHITE, for appellee Charles Culp.

THOMAS M. TYACK & ASSOCIATES, and MR. THOMAS M. TYACK, for appellee Bryan Krebs.

MR. TERRY BREEDLOVE, JR., pro se.

HAHN, LOESER & PARKS, and MR. LEE I. FISHER; JONES, DAY, REAVIS & POGUE, and MR. RICHARD A. CORDRAY, for amicus curiae Senator Lee I. Fisher.

MR. LEE FISHER, Attorney General, MR. SIMON B. KARAS and MR. ERIC A. WALKER, for amicus curiae Attorney General.

SHEPPARD AND BALE, and MR. ALAN WAYNE SHEPPARD, for amicus curiae Ohio Council of Churches.

JONES, DAY, REAVIS & POGUE, and MR. STEVEN T. CATLETT, for amicus curiae Anti-Defamation League.

MR. ALPHONSE A. GERHARDSTEIN, for amicus curiae Housing Opportunities Made Equal.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS, City Prosecutor, and MR. THOMAS K. LINDSEY, for amicus curiae City of Columbus.

MR. HARRY R. REINHART; ESLOCKAR, GRIM, HODSON & DIOGUARDI, and MS. NICOLETTE DIOGUARDI, for amicus curiae Ohio Association of Criminal Defense Lawyers.

APPEALS from the Franklin County Court of Common Pleas.

BOWMAN, P.J.

On November 8, 1989, the Franklin County Grand Jury returned an eight-count indictment against appellees, Clancy Van Gundy, Casey Van Gundy, Franklin Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., charging each of them with seven counts of ethnic intimidation, R.C. 2927.12. The charges were predicated on the underlying offense of aggravated menacing, R.C. 2903.21, in that appellees did knowingly cause the victims to believe that appellees would cause serious physical harm to them by reason of their race, color, religion or national origin. Clancy Van Gundy was also charged with felonious assault, R.C. 2903.11, in that he did knowingly cause serious physical harm to one of the victims, Jason Harris, and with a specification, pursuant to R.C. 2941.143, in that Clancy Van Gundy did, during the commission of the felonious assault, cause physical harm to Jason Harris.

On March 14, 1990, a hearing was held before the trial court on appellees' motion to dismiss the seven counts of ethnic intimidation on the basis that the ethnic intimidation statute was unconstitutional. After arguments, the court found that R.C. 2927.12 was unconstitutionally overbroad and vague and granted appellees' motion to dismiss the seven counts of ethnic intimidation.

Thereafter, on March 28, 1990, the trial court issued a written opinion stating that R.C. 2927.12 was unconstitutional because it was vague, it violated the due process and equal protection clauses, and it had a chilling effect upon the First Amendment rights of free speech and association. The trial court dismissed Counts Two through Eight of the indictments against all of the appellees; however, Count One of the indictment, pertaining to the felonious assault charge and specification as to appellee, Clancy Van Gundy, was not dismissed and was to be tried at a later date.[1]

On April 26, 1990, appellant, the state of Ohio, appealed the dismissal of Counts Two through Eight of the indictments as to all appellees.[2] Appellant asserts the following assignment of error:

> "OHIO REVISED CODE, SECTION 2927.12, ETHNIC INTIMIDATION, VIOLATES NO CONSTITUTIONAL PROVISION AND IS NOT VAGUE OR OVERBROAD."

The issue presented to this court is whether R.C. 2927.12 is void for vagueness or is overbroad. Appellant asserts that the statute is neither vague nor overbroad and, therefore, the trial court erred in holding it

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[1] Van Gundy's subsequent conviction for felonious assault was affirmed by this court in State v. Van Gundy (Dec. 20, 1990), Franklin App. No. 90AP-556, unreported (1990 Opinions 5876).

[2] This court notes that appellee, Terry Breedlove, Jr., has failed to file a brief in this case. However, inasmuch as the facts and issues have been briefed by the remaining appellees and are identical to all parties, this court need not accept appellant's statement of the facts and issues as correct as to appellee, Breedlove, based on his failure to file a brief. See App. R. 18(C).

unconstitutional, and in dismissing the counts of ethnic intimidation against appellees.

R.C. 2927.12 provides:

> "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The Due Process Clause of the Fourteenth Amendment requires reasonable definiteness in the language of a statute. Roth v. United States (1957), 354 U.S. 476. In United States v. Harriss (1954), 347 U.S. 612, the United States Supreme Court stated that the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The vagueness doctrine contemplates that criminal responsibility should not attach where an individual could not, with reasonable certainty, understand that his proposed conduct is disapproved of when measured against the language of the statute. See State v. Loless (1986), 31 Ohio App. 3d 5.

However, a statute is not void for vagueness merely because it could have been more precisely worded. Roth, supra. The legislature need not define every word of a statute, and words of ordinary usage will be given the meaning

commonly attributed to them. State v. Dorso (1983), 4 Ohio St. 3d 60. The test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Jordan v. DeGeorge (1951), 341 U.S. 223.

The root of the vagueness doctrine is a rough idea of fairness. Colten v. Commonwealth of Kentucky (1972), 407 U.S. 104. The vagueness doctrine implies that a statute must be written so a man of common intelligence can ascertain what conduct is prohibited, and that the law must provide sufficient standards to prevent arbitrary and discriminatory enforcement. Connally v. General Const. Co. (1926), 269 U.S. 385; Papachristou v. City of Jacksonville (1972), 405 U.S. 156.

In Connally, supra, the court stated that the dividing line between what is lawful and unlawful cannot be left to conjecture. The crime, and the elements constituting the crime, must be so clearly expressed that an ordinary person can intelligently choose, in advance, what course of conduct he may lawfully pursue.

Under the void for vagueness doctrine, the statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; however, in addition, the void for vagueness doctrine also requires that the statute must provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. It is this second aspect of the void for vagueness doctrine, the requirement that the legislature establish minimal guidelines to govern law enforcement, that the courts have recently recognized as being the more important aspect of the

doctrine. Kolender v. Lawson (1983), 461 U.S. 352. Where the legislature fails to provide these minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal prejudices. Smith v. Goguen (1974), 415 U.S. 566. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, and with the danger of arbitrary and discriminatory application. Grayned v. City of Rockford (1972), 408 U.S. 104.

This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited. The statute states that no person shall violate any one of the enumerated sections "*** by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, i.e., the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

More importantly, the statute is void for vagueness because it encourages arbitrary and discriminatory enforcement. The statute vests virtual complete discretion in the hands of the state to determine whether a suspect committed the alleged acts based on the race, color, religion or national origin of another person or a group of persons. The statute fails to establish standards by which police officers may determine whether or not a suspect has allegedly committed a crime as a result of the race, color, religion or national origin of another person or group of persons. As such, the statute confers on the police a virtually unrestrained power to arrest and charge persons with a violation of ethnic intimidation. See Lewis v. City of New Orleans (1974), 415 U.S. 130 (Powell, J., concurring in result). Thus, the determination of whether or not a person should be charged with ethnic intimidation is entrusted to the moment-by-moment judgment of the police in any given situation. See Kolender, supra. The statute also furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups who are deemed to merit their displeasure. See Thornhill v. Alabama (1940), 310 U.S. 88.

Another aspect affecting whether or not R.C. 2927.12 is constitutional is its infringement on the First Amendment right of freedom of speech. It is fundamental that statutes which regulate First Amendment activities must be narrowly drawn to address only the specific evil at hand. Broadrick v. Oklahoma (1973), 413 U.S. 601. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that speech which it may legitimately regulate. City of Houston v. Hill (1987), 482

U.S. 451. The Supreme Court has consistently held that statutes punishing speech or conduct solely on the ground that they are unseemly or offensive are unconstitutionally overbroad. Doe v. University of Michigan (E.D. Mich. 1989), 721 F. Supp. 852.

In Grayned, supra, the Supreme Court stated that the cases make it clear that, in assessing the reasonableness of a regulation, a court must weigh heavily the fact that communication is involved. As a result, the regulation must be narrowly tailored to further the state's legitimate interests. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, and that particular expressive activity cannot be prohibited because of a desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. See Tinker v. Des Moines School Dist. (1969), 393 U.S. 503.

The Supreme Court has applied the overbreadth doctrine in the First Amendment area when the challenged law has had a "chilling effect" on constitutionally preferred liberties. Dombrowski v. Pfister (1965), 380 U.S. 479; NAACP v. Button (1963), 371 U.S. 415; Thornhill, supra. Freedom of speech is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. Staub v. City of Baxley (1958), 355 U.S. 313.

Appellant asserts that R.C. 2927.12 does not regulate speech but, rather, enhances the penalty for unlawful conduct committed for an improper motive or purpose, i.e., because of the race, color, national origin or religion

of a person or group of persons. Appellant asserts that an individual cannot be charged with ethnic intimidation unless he has already committed unlawful conduct by committing one of the enumerated crimes contained in the statute and, thus, speech is not curtailed. This court disagrees. What the ethnic intimidation statute is punishing by enhancement of the penalty for the listed criminal offenses is the spoken or written word or expression thereof by conduct.

In Texas v. Johnson (1989), 109 Sup. Ct. 2533, 2544, the court stated:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. ***"

In Board of Education v. Barnette (1943), 319 U.S. 624, at 642, the court stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. ***"

In Terminiello v. Chicago (1949), 337 U.S. 1, the Supreme Court stated that a principal function of free speech under our system of government is to invite dispute. Free speech may indeed thus serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Merely advocating force does not remove speech from the protection of the First Amendment. NAACP v. Claiborne Hardware Co. (1982), 458 U.S. 886. While the underlying conduct, i.e., assault, menacing threats and the like, are crimes and may be punished, the government may not, by

enhancing penalties, prohibit expression simply because it disagrees with its message. Johnson, supra.

This court finds that R.C. 2927.12 is unconstitutional on its face. The statute makes a crime out of what, under the constitution, cannot be a crime since it is aimed directly at activity protected by the constitution. The First and Fourteenth Amendments do not permit a state to make criminal the exercise of the right of speech or conduct simply because its exercise may be annoying or offensive. Coates v. City of Cincinnati (1971), 402 U.S. 611. Further, because speech or conduct can be used to show the motivation behind a person's actions, a finding of guilt under R.C. 2927.12 is based on an undifferentiated mix partially for what is said and partially for what is illegally done and, as such, a conviction under the statute cannot stand. Cleveland v. Mechanic (1971), 26 Ohio App. 2d 138. See, also, State v. Johnson (1982), 6 Ohio App. 3d 56.

In most instances, the words or conduct of a person charged with ethnic intimidation will be the only indicia of his attitude or opinion on a subject, and this attitude or opinion is inseparably intertwined with the content of the statements or the conduct. Also, in most cases, it will solely be because of what a person says or what a person does that the police will perceive that a person's actions were motivated by the race, color, religion or national origin of another person or group of persons. Further, in most cases, it will be clear that, but for the remarks or the conduct, the individual would not be charged with ethnic intimidation, although he could be charged with the underlying crimes. The First Amendment's Free Speech Clause cannot be laid aside simply on

the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby. See Tygrett v. Washington (1974), 543 F. 2d 840.

In City of Cincinnati v. Black (1966), 8 Ohio App. 2d 143, 146-147, the court, in holding that an ordinance which made it a crime to sell, offer for sale, or give away a pamphlet or paper which contained an article subjecting to ridicule or contempt any class or group of citizens on account of race, religious belief, or which in any manner tends to promote racial hatred or religious bigotry unconstitutional, stated:

> "It is thus seen that the ordinance undertakes to control the extent of free expression in the fields of religious and political affairs, two fields which have been given the widest possible latitude by constitutional interpretation; and also in the field of race relations which, while not written directly into either the federal or state Constitutions, has nevertheless in present day society, by judicial interpretation of the Fourteenth Amendment and by legislative enactment, received wide-spread public attention. The ordinance makes it an offense to communicate hatred and bigotry in the fields of race and religion. Bigotry and hatred reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to the special commandment 'that ye love one another,' but no means has as yet been found or attempted to compel this highly commendable viewpoint by law. Obviously any attempt to do so would border very closely on thought control which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know."

This court finds that this sentiment is equally applicable in the instant case. The constitutional protection of the First Amendment does not depend upon the truth, popularity or social utility of the ideas and beliefs put forward. Craig v. Harney (1947), 331 U.S. 367. Where First Amendment rights are

jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a court will take the extraordinary step of enjoining the state prosecution. Dombrowski, supra.

This court recognizes that, by holding R.C. 2927.12 unconstitutional, we have struck down a statute that deals with an extremely significant problem in our society. The concern of citizens with criminal activity motivated by the race, color, religion or national origin of another person or group of persons is certainly a matter requiring the attention of all branches of government. However, as weighty as this concern may be, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. While the objective of the legislation cannot be questioned and the conduct sought to be punished is reprehensible, R.C. 2917.12 in its sweeping reach and its imprecise method of enforcement is incompatible with due process requirements. These constitutional considerations may not be dismissed merely because there is a laudatory legislative end sought to be achieved. See State v. Young (1980), 62 Ohio St. 2d 370, certiorari denied Ohio v. Young (1980), 449 U.S. 905.

Therefore, based on the foregoing, this court finds that the trial court did not err in determining that R.C. 2927.12 was unconstitutional. The statute allows arbitrary and discriminatory action by police, prosecutors, courts and juries permitting them, on a case-by-case basis, to subjectively determine whether the conduct or speech or action before them violates the statute. It does not provide fair warning to a person of ordinary intelligence that

contemplated conduct will violate the statute because it is overbroad and violates the First Amendment right to free speech and conduct. Accordingly, appellant's assignment of error is not well-taken and is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and KLINE, JJ., concur.

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

11266820

STATE OF OHIO :

PLAINTIFF, :

VS. : CASE NO. 89-CR-11-5166
A,B,C,D,E,F,G

CHARLES CULP
~~CLANCY VAN GUNDY~~, ET AL : JUDGE WEST

DEFENDANTS :

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OPINION

This matter came on to be heard by written Motions to Dismiss Counts Two through Eight of the Indictments submitted by Defendants Culp, Clancy Van Gundy, and Breedlove and upon the oral motions of the other defendants at hearing, for the reasons advanced by counsel for Culp and Clancy Van Gundy. The Prosecution filed memoranda contra to the written motions and expressed no opposition to the other defendants joining in the Motions at hearing.

The reasons advanced in the Motions to Dismiss were that the statute on its face violates the First, Sixth and Fourteenth Amendments to the U.S. Constitution and Article One, Section Eleven of the Ohio Constitution. The Court agrees and sustains the Motion to dismiss Counts Two through Eight of the Indictment.

Defendants were indicted in felony Counts Two through Eight for violation of (2927.12 O.R.C by reason of (2903.21 O.R.C.(a misdemeanor). Motions were filed by various defendants, and the Court set March 14, 1990 as the date for hearing all pending motions, including the Motions to Dismiss. No facts were placed in evidence, and the hearing was based solely on the pleadings and the law.

The law presumes a statute constitutional Courts are instructed to give the words of a statute their plain meaning when no expression of legislative intent in published. However, where a law is so written that persons "of common intelligence must guess as to its meaning and differ as to its application" it must be struck as void for vagueness. Connally v. General Construction Co., 269 U.S. 385, 391. The Court finds that (2927.12 O.R.C. requires a person of normal intelligence to "speculate as the meaning" of this penal statute. See State v.Kasnett, 34 O.S.2d 193.

The Court notes that the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done "knowingly", does not define "by reason of", and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.

The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if "by reason of" the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so.

The Court also finds that this statute is void because of its chilling effect upon First Amendment rights of speech and association. In effect, this statute would enhance the punishment

of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence.

The indictments as to all the defendants as set forth in Counts Two though Eight are hereby dismissed. Defendant Clancy Van Gundy still stands accused as indicted in Count One and his trial shall remains set for May 20, 1990. All other motions pending are rendered moot by reason of this opinion.

11266C02

JUDGE

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FULL TEXT OF STATUTES CITED

Section 750.147, Michigan Comp. Laws Ann.

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is substantial cause to believe that an act described in subdivision (a) or (b) will occur.

Section 240.30(3), New York Penal Law

A person is guilty of aggravated harassment in the second degree when with intent to harass, annoy, threaten, or alarm another person, he:

***

3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person."

Section 2901.21, Ohio Revised Code (Requirements for criminal liability)

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

Section 2901.22, Ohio Revised Code (Culpable mental states)

(A) A person acts purposely when his specific intention is to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with a heedless indifference to the consequences, he perversely disregards a known risk that his conduct will cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with regard to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

Section 2903.21, Ohio Revised Code (Aggravated menacing)

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.

(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree."

Section 2927.12, Ohio Revised Code (Ethnic intimidation)

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree that the offense the commission of which is a necessary element of ethnic intimidation."

Section 166.165(1)(a)(A), Oregon Revised Statutes

Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:

(a)(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation."

Supreme Court, U.S.
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No. 92-568

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OHIO,
Petitioner,

v.

DAVID WYANT,
Respondent.

STATE OF OHIO,
Petitioner,

v.

JAMES MAY, JR., et. al.,
Respondent.

STATE OF OHIO,
Petitioner,

v.

CLANCY VAN GUNDY, et. al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENTS WYANT, STATON, PLESSINGER, CLANCY VAN GUNDY, KREBS, & CULP

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QUESTION PRESENTED FOR REVIEW

I. SHOULD THIS COURT REVIEW A CASE IN WHICH THE SUPREME COURT OF OHIO RESTED ITS DECISION UPON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUNDS?

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JURISDICTION

The judgment of the Ohio Supreme Court was based upon adequate and independent state constitutional law grounds. Therefore, 28 U.S.C. Section 1257(a) does not confer jurisdiction in this Court. **See Michigan v. Long**, 463 U.S. 1032 (1983); **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562 (1977).

STATEMENT OF THE CASE

Respondents accept the Petitioner's statement of the case, with the following correction. Petitioner is incorrect in its assertion that Ohio Revised Code Section 2927.12 is a penalty enhancement statute. Petition for Writ of Certiorari at 3. Far more than simply enhancing the penalty for the commission of one of the underlying offenses, this section creates the whole new offense of ethnic intimidation. A violation of this section is an offense of the next higher degree than that of the underlying offense and subjects the offender to a new, much higher range of penalties. In all of the cases subject to this petition, the offenses charged were changed from misdemeanors to felonies.

SUMMARY OF THE ARGUMENT

The decision of the Ohio Supreme Court in this case rested solidly on independent and adequate state constitutional grounds. Therefore, this Court lacks jurisdiction to accept this case. **Michigan v. Long**, 463 U.S. 1032 (1983).

The Ohio Supreme Court also held that R.C. 2927.12 violates the First Amendment. In **R.A.V. v. City of St. Paul, Minnesota**,

___ U.S. ___, 112 S.Ct. 2538 (1992), this Court settled the First Amendment issue raised in this case. The decision in **R.A.V.** controls the First Amendment analysis of Ohio Revised Code Section 2927.12 and compels the conclusion that that law is unconstitutional under the First Amendment.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE JUDGMENT OF THE SUPREME COURT OF OHIO IS BASED ON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL GROUNDS.

The Supreme Court of Ohio held that "the effect of R.C. 2927.12 is to create a 'thought crime.' This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution." **State v. Wyant**, 64 Ohio St. 3d 566, 579 (1992).[1] Although the court discussed both the federal and state constitutions, the Petitioner is incorrect when it implies that the court first found that R.C. 2927.12 violated the First Amendment and that its additional holding that the statute violated the Ohio Constitution was therefore "foreordained." Petition for Writ of Certiorari at 19. Rather, the Ohio Supreme Court plainly stated that it was relying directly upon the more specific language found in the Ohio Constitution. That statement precludes the

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[1] The Petitioner is thus incorrect in its characterization of the opinion below as resting solely on "freedom of **speech**." Petition at 5 (emphasis added).

granting of the writ of certiorari sought by the Petitioner. See **Michigan v. Long**, 463 U.S. 1032, 1037 and n. 3 (1983).

In an effort to avoid the "independent and adequate state grounds" rule promulgated by this Court in **Michigan v. Long** and other cases, the Petitioner misstates previous opinions of the Ohio Supreme Court. The Supreme Court of Ohio has not held that Section 11, Article I of the Ohio Constitution grants no broader protection than the First Amendment.[2] The Petitioner has misrepresented the language quoted from **State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals**, 63 Ohio St. 3d 354 (1992). The language quoted by the Petitioner was not that of the Ohio Supreme Court, but that of the Court of Appeals below in that case. The lower court's opinion in **Rear Door Bookstore** was not "adopted" by the Ohio Supreme Court, as stated by the Petitioner, Petition at 19; rather, the Ohio Supreme Court simply "affirmed on authority of the court of appeals' decision below ... **attached as an appendix** to this Opinion." 63 Ohio St. at 355 (emphasis added). Furthermore, the language in **Rear Door Bookstore** relied upon by the Petitioner is not part of the court's syllabus. Under Ohio law, only the syllabus "states the controlling point or points of law decided." Rule 1(B), Ohio Supreme Court Rules for the Reporting of Opinions (1983). See

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[2] The Ohio Supreme Court has not been reluctant to hold provisions of the Ohio Constitution to be coextensive with analogous provisions of the federal Constitution, and states such holdings quite explicitly. A recent example is **State v. Self**, 56 Ohio St. 3d 73, 79 (1990)(holding confrontation clause of Ohio Constitution Article I, Section 10, coextensive with Sixth Amendment Confrontation Clause), an opinion authored by Justice Brown, the same Justice who wrote the opinion in the present case.

Ohio v. Johnson, 467 U.S. 493, 497-98 n. 7 (1984); **State ex rel. Donahey v. Edmonson**, 89 Ohio St. 93 (1913); **see also Perkins v. Benguet Mining Co.**, 342 U.S. 437, 441-42 (1952).

Rear Door Bookstore therefore cannot be relied upon as a statement of the Ohio Supreme Court that Section 11, Article I of the Ohio Constitution is coextensive with the First Amendment to the federal Constitution. Rather, the Ohio Supreme Court's language in **Wyant** itself demonstrates that that court has now held that the Ohio Constitution does indeed grant protection to thought that is independent of the protection guaranteed by the federal Constitution.

The syllabus of **State v. Wyant** reads: "The effect of R.C. 2927.12 is to create a 'thought crime,' **in violation of Section 11, Article I of the Ohio Constitution**, and the First and Fourteenth Amendments to the United States Constitution." **Wyant**, 64 Ohio St. 3d at 566 (emphasis added). In **Ohio v. Johnson**, this Court recognized "Ohio courts do not suggest that the opinion is not germane to interpreting the court's holding as expressed in its syllabus." 467 U.S. at 497, n. 7. The Ohio Supreme Court's opinion in **Wyant** demonstrates that its holding rested on the Ohio Constitution as an independent basis for its decision. The Ohio Supreme Court noted, as an alternative basis for its holding, that punishment of thought also offends the First Amendment to the United States Constitution. **Wyant**, 64 Ohio St. 3d at 567-77. However, this does not mean that the court's state law holding was, as the Petitioner would have it, "foreordained" by its interpretation of the First Amendment. As this Court has stated:

> [A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.

Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989)(emphasis in original). **See also California v. Freeman**, 488 U.S. 1311, 1314 (1989), certiorari denied (1989), 489 U.S. 1017, (denial of application for stay)("Discussion of federal law -- specifically the First Amendment -- ... constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid.").

Indeed, the Ohio Supreme Court went on to point out that, unlike the First Amendment, Section 11, Article I of the Ohio Constitution contains language directed not only toward speech, but toward thought itself:

> The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. **The Constitution of Ohio is even more specific**; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to **have** "sentiments on all subjects."

Wyant, 64 Ohio St. 3d at 577 (quoting Ohio Const., Art. I, Sec. 11)(first emphasis added).

The Ohio Supreme Court specifically relied on this particular language of the Ohio Constitution, which is not found in the federal Constitution and which is directed toward the protection of freedom of thought, the infringement of which was the fatal flaw of R.C. 2927.12. This demonstrates that the Ohio Constitution constitutes an adequate and independent basis for the court's decision. Thus, this Court is without jurisdiction to review the judgment of the Ohio Supreme Court. **Michigan v. Long**, 463 U.S. 1032 (1983); **Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562 (1977).

Finally, it should also be noted that in the Ohio Supreme Court, the defendants raised several other challenges to R.C. 2927.12. The Ohio Supreme Court reserved ruling on those issues, stating: "These arguments may have merit, especially in view of the concurring opinion by Justice White in **R.A.V. v. St. Paul**. However, because of our holding we need not address these challenges." 64 Ohio St. 3d at 579-80 (citation omitted). Those reserved challenges, too, rested on state constitutional law grounds. For this reason as well, this Court should deny the petition for certiorari.

II.

THIS COURT'S DECISION IN R.A.V. v. CITY OF ST. PAUL, MINNESOTA, ___ U.S. ___, 112 S.Ct. 2538 (1992), HAS ALREADY DETERMINED THE FIRST AMENDMENT ISSUE PRESENTED BY THE PETITIONER.

As discussed above, the Ohio Supreme Court's decision in this case is based on adequate and independent state

constitutional law grounds. This Court has recently engaged in a similar analysis under the First Amendment.

In **R.A.V. v. City of St. Paul, Minnesota**, ___ U.S. ___, 112 S.Ct. 2538 (1992), this Court clarified that even in areas in which government may, consistently with the First Amendment, regulate or punish expression, it may not do so based upon the content or viewpoint of the expression. Thus, although certain categories of expression, such as "fighting words" (the category ostensibly at issue in the present case), may be punished, the punishment may not be based upon the government's hostility or favoritism toward the message expressed. **Id.** at ___, 112 S.Ct. at 2545.

Not only does R.C. 2927.12 impose additional punishments for an offender's motives (which in itself creates a thought crime), it does so only for motives with a particular content: the only motives punished are those involving "race, color, religion, or national origin." As this Court emphasized in **R.A.V.**, "[t]he First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." **Id.** at ___, 112 S.Ct. at 2547 (citing **Simon & Schuster Inc. v. Members of the N.Y. Crime Victims Bd.**, ___ U.S. ___, 112 S.Ct. 501 (1991); **Arkansas Writers' Project, Inc. v. Ragland**, 481 U.S. 221, 229-30 (1987)). Like the ordinance held unconstitutional in **R.A.V.**, R.C. 2927.12 offends the First Amendment because of its selective punishment of "'bias-motivated' hatred and ... 'virulent notions of racial supremacy.'" **R.A.V.** at ___, 112 S.Ct. at 2548.

The Petitioner contends that the harm caused by crimes including bias elements is qualitatively different from the harm caused by other crimes. However, that additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint. The same offensiveness, alarm, and sense of disempowerment is caused by bigoted speeches, books, and demonstrations, all of which are indisputedly protected by the First Amendment. Where the same message is communicated by illegal conduct, even expressive conduct, the message does not shield the conduct; the criminal act may be punished as always. However, the offensive message itself does not lose its constitutional protection. Thus, one who burns a flag "by reason of" opposition to government policies may constitutionally be punished for a violation of a public burning law; but the government could not constitutionally upgrade the offense on the basis of the offender's motive for the offense or the message conveyed thereby, despite any additional harm or offensiveness it may create. In **Texas v. Johnson**, 491 U.S. 397 (1989), and **United States v. Eichman**, 494 U.S. 1021 (1990), this Court explicitly acknowledged that flag burnings cause greater and more widespread effects than other unlawful burnings. However, because the "plus" element was the impact of the offender's opinion, the content of his or her communication, it could not constitutionally be the basis for additional punishment.

In **R.A.V.**, this Court considered the same argument, acknowledging the special harm of bias-related crime and the state's interest in recognizing and protecting particular

vulnerabilities of groups who have historically been victimized. Nevertheless, even this compelling interest did not justify the content and viewpoint basis for punishment: "[W]hat makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily." ___ U.S. at ___, 112 S.Ct. at 2548.

Moreover, assertion of a compelling state interest does not end the analysis. Because the statute infringes freedom of thought, it is subject to strict scrutiny. In **R.A.V.**, this Court rejected St. Paul's contention that, despite the ordinance's regulation of expression based on hostility towards its protected ideological content, the selective prohibition was permissible because it was narrowly tailored to serve a compelling state interest in protecting the rights of members of groups historically subject to discrimination. Although this Court acknowledged the importance of the asserted interest, it rejected the argument that the content- and viewpoint-based regulation was necessary to serve that interest; "it plainly is not," said this Court, because content- and viewpoint-neutral alternatives existed. Id. at ___, 112 S.Ct. at 2550.

> In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing

> unique limitations upon speakers who (however benightedly) disagree.

Id. (footnote omitted).

Likewise, the State of Ohio has at its disposal content-and viewpoint-neutral means to punish all conduct reached by R.C. 2927.12. The statutes criminalizing the offenses the commission of which is a necessary predicate to violation of R.C. 2927.12 already do exactly that. **Wyant**, 64 Ohio St. 3d at 570, 579. The Petitioner argues that additional penalties are necessary to redress the special harms caused by bias-motivated crimes. However, as written, R.C. 2927.12 does not address any such additional effects, only the content of the offender's motives. In addition to the punishment of thought this scheme creates, motive is not even a valid surrogate for those effects.

In any event, content- and viewpoint-neutral alternatives exist to address additional effects, as well. Should a legislature determine that additional penalties are necessary for those additional effects, it need only construct a statute addressing effects rather than motives: for example, a statute upgrading offenses where the offender acted "with specific intent to create terror in a definable community," or "with specific intent to issue a threat of further crime." Such formulations are content and viewpoint neutral. They would still reach all the conduct contemplated by R.C. 2927.12 (and more besides, such as drive-by shootings, threats to abortion clinics, and poisoning of bottles of painkillers). The existence of such adequate content-neutral alternatives thus confirms the unconstitutionality of R.C. 2927.12 just as it did that of the

St. Paul ordinance in **R.A.V.**: "The existence of adequate content-neutral alternatives ... 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law.'" ___ U.S. at ___, 112 S.Ct. at 2550 (citations omitted).

Petitioner suggests that the decision of the Ohio Supreme Court in the present case "impacts" federal and state antidiscrimination laws, and urges this Court to grant certiorari to "preserve" and "ratify the continuing validity of" those laws. Petition for Certiorari at 13, 14. In so doing, the Petitioner invites this Court to exceed the limits of its jurisdiction and to render an advisory opinion on the constitutionality of an array of statutes which are not at issue before the Court in the present case.

Furthermore, the **Wyant** opinion, far from inviting challenges to antidiscrimination laws or providing authority therefore, specifically distinguishes those laws. The Ohio Supreme Court addressed and rejected the Petitioner's contention below that, because the federal and state antidiscrimination laws are constitutional, R.C. 2927.12 must be, too. **Wyant**, 64 Ohio St. 3d at 575. The court distinguished civil statutes, such as those prohibiting employment discrimination, as "analytically distinct in several ways from the statute in question here." **Id.** Under such laws, explained the court, "[i]t is the **act** of discrimination that is punished, not the thoughts (or bigotry) of the actor." **Id.** (emphasis in original).

Finally, the Petitioner's reliance on **Dawson v. Delaware**, ___ U.S. ___, 112 S.Ct. 1092 (1992), and **Barclay v. Florida**, 463 U.S. 939 (1983), is misplaced. Not only is the Ohio Supreme Court's decision in the present case consistent with **Dawson** and **Barclay**, it is supported by them. Both **Dawson** and **Barclay** dealt with factors that could be considered only after the appropriate sentencing range had already been fixed. R.C. 2927.12, by contrast, creates a new and much higher range. More important, **Dawson** and **Barclay** stand simply for the proposition that the First Amendment creates no "**per se** barrier to the admission of evidence concerning one's beliefs ... at sentencing." **Dawson**, ___ U.S. at ___, 112 S.Ct. at 1097. Racist sentiment, although protected by the First Amendment, may, like anything else, be used as evidence of content-neutral sentencing factors. However, it is an unfounded leap of logic to rely upon **Dawson** and **Barclay** for the novel proposition that because First Amendment-protected activity may under some circumstances be used as evidence of content-neutral sentencing factors, that activity may itself be a sentencing factor, let alone a substantive element of an offense.

In **Barclay**, this Court found that consideration of this evidence was permissible not because it was itself an allowable aggravating factor, but because it was relevant to an existing, content-neutral statutory aggravating factor; namely, that the offense was committed in an "especially heinous, atrocious, or cruel" manner. **Barclay**, 463 U.S. at 949. In **Dawson**, this Court rejected the use of racial hatred as evidence of a neutral aggravating factor. In fact, the dissent in **Dawson** characterized

the majority's opinion as holding that "the First Amendment limits the aspects of a defendant's character that [sentencing courts and juries] may consider." **Dawson** at ___, 112 S.Ct. at 1104 (Thomas, J., dissenting)(emphasis added).

Thus, both **Barclay** and **Dawson** make clear that even the introduction of a defendant's hatreds and bigotries as evidence of some other, content-neutral, aggravating factor must be undertaken only with utmost caution and only under very limited circumstances. They do not state that hatreds and bigotries may themselves be punishable elements.

Hatred, bias, and prejudice, repugnant as they may be, are indisputably opinions and beliefs on social issues, and as such are constitutionally protected from punishment. As this Court once said, "the freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." **West Virginia Bd. of Educ. v. Barnette**, 319 U.S. 624, 642 (1943).

CONCLUSION

For the foregoing reasons, the Respondents ask this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

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Brief of *Amicus Curiae* Cook County, Illinois in Support of Petitioners

INTEREST OF AMICUS CURIAE

The citizens of Cook County, Illinois as amicus curiae have a critical interest in this Court's review of the validity of "hate crimes" statutes which enhance the penalty for crimes committed because of individuals' status within particular groups. In response to a proliferation of such targeted crimes, the Illinois General Assembly has enacted two statutes. One statute creates an offense called a "hate crime" where one commits otherwise criminal acts by reason of the status of others. The other statute adds an

aggravating factor to the Illinois sentencing code where felonies are committed because of such status of the victim. The Cook County State's Attorney's Office created and administers a Hate Crimes Prosecutions Council of prominent community leaders to address the rising problem of hate crimes. Vigorous action is required: statistics for the first eight months of this year show that citizens in the City of Chicago alone have reported hate crimes to the police at a rate of almost one every other day.[1]

The Illinois statutes penalize those who cause not only the harm inherent in the underlying criminal acts but in addition the harm arising from assaulting an entire community whose members are, or fear they will be, singled out for crime. The statutes leave citizens free to express their beliefs about others—no matter how hateful—within the uncensored marketplace of ideas: the statutes reach only those who physically prey on others through criminal acts. The Illinois hate-crime statutes do not target speech or violate the constitutional provisions for freedom of speech. To the contrary, they ensure that individuals cannot, through criminal intimidation, deny entire groups access to the oasis of freedom created by the First Amendment.

The erroneous reasoning of the Wisconsin and Ohio Supreme Courts impedes and may preclude effectuation of the Illinois statutes.[2] This Court's decision in *R.A.V. v.*

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[1] According to Chicago Police Department records for January through August 1992, citizens reported 104 hate crimes: 81 by reason of race, 10 by reason of sexual orientation, 8 by reason of religion, and 5 by reason of national origin.

[2] Various state courts have rapidly and inconsistently ruled on the constitutionality of hate-crime statutes. *Compare Dobbins v. Florida*, No. 91-1953, 1992 Fla. App. LEXIS 10062 (Sept. 24, 1992);

(Footnote continued on following page)

City of St. Paul, 112 S. Ct. 2538 (1992), while supportive of the validity of the Illinois laws, is subject to misapplication absent clear elaboration. Defendants charged with hate crimes have begun filing motions to dismiss in the trial courts relying on other states' decisions and misreading of this Court's decision in *R.A.V.*[3] Only immediate review by this Court will avoid delay and chaotic *ad hoc* rulings.

ARGUMENT

REVIEW BY THIS COURT IS ESSENTIAL TO ESTABLISH THAT THE FIRST AMENDMENT DOES NOT APPLY TO STATUTES WHICH PENALIZE THE COMMISSION OF CRIMINAL ACTS BY REASON OF INHERENT OR CORE CHARACTERISTICS OF INDIVIDUALS.

A. The Illinois Hate-Crime Statutes.

Each hate crime is a crime committed against an individual and an assault committed against a larger group. The Illinois hate-crime statute, Ill. Rev. Stat. ch. 38, par.

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[2] *continued*

Oregon v. Plowman, No. SC S38328 1992 Ore. LEXIS 158 (Sup. Ct. Aug. 27, 1992) (in banc); *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115 (1991); *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (Crim. Ct. 1988) (all upholding various hate-crime statutes under First Amendment) *with State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992); *Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992) (finding hate-crime statutes violative of First Amendment).

[3] The tenuous situation in Cook County is present throughout the State of Illinois, and undoubtedly nationwide. The Cook County State's Attorney is a member of an Association of 102 State's Attorneys in Illinois, all of whom view hate-crimes prosecution as a high priority and share our concern about the jeopardy in which the Illinois statutes presently stand.

12-7.1, applies when certain crimes—such as assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, or mob action[4]—are committed "by reason of" another individual's or other individuals' race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin. The statute creates a separate offense from the underlying offense. A first offense hate crime is a Class A misdemeanor; subsequent offenses are Class 3 felonies.[5] The underlying crimes range in severity from lower to higher than the hate crime, so that while the statute is not *per se* a sentencing enhancer, it can act as one.[6] In addition to the criminal provisions, the hate crime statute creates a private right of civil action. *See* Ill. Rev. Stat. ch. 38, par. 12-7.1(c). A separate statute, Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(a)(10), is an explicit penalty enhancer in felony cases, creating a factor in aggravation (warranting imprisonment or a lengthened term) where "the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin."

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[4] Effective January 1, 1993, the legislature has amended the underlying offenses to include disorderly conduct and harassment by telephone. P.A. 86-1418, 87-440.

[5] Effective January 1, 1993, a first offense is a Class 4 felony and subsequent offenses are Class 2 felonies. P.A. 86-1418, 87-440.

[6] The hate-crime statute requires the sentencer to impose designated minimum amounts of community service, *see* Ill. Rev. Stat. ch. 38, par. 12-7.1(b), which could optionally be imposed on the underlying convictions, *see* Ill. Rev. Stat. ch. 38, pars. 1005-6-2(b), 1005-6-3(9).

The Wisconsin hate crime statute, Wis. Stat. Ann. sec. 939.645 (West 1982 and Supp.) similarly enhances penalties for any crime defined in the Wisconsin Criminal Code if the offender intentionally selects the victim or owner of property "because of the actor's belief or perception" regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person, even if the actor's belief is incorrect. Finally, the Ohio ethnic intimidation statute, Ohio Rev. Code Ann. sec. 2927.12 (Baldwin 1990), provides special penalties for aggravated menacing, menacing, criminal damaging or endangering, criminal mischief and certain forms of telephone harassment whenever the crime is committed "by reason of" the race, color, religion, or national origin of the victim or group of victims. This provision acts as a penalty enhancer because ethnic intimidation is "an offense of the next higher degree" than that for the predicate offense.

B. The Illinois, Wisconsin, And Ohio Hate-Crime Statutes Differ Fundamentally From The Law Invalidated In *R.A.V. v. St. Paul.*

The Illinois, Wisconsin, and Ohio hate-crime statutes do not concern expression of ideas. They are a wholly different species from the St. Paul, Minnesota ordinance struck down in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), a content-based proscription on speech.

The language of the Illinois statute is about *crime* and its victims: "A person commits hate crime when, by reason of [specified characteristics of another individual], he commits [an underlying offense]." Ill. Rev. Stat. ch. 38, par. 12-7.1(a). The language of the St. Paul ordinance, by contrast, is about *speech* and its effects:

> Whoever places on public or private property a *symbol*, object, *appellation*, *characterization* or *graffiti*

> . . . which one knows or has reasonable grounds to know *arouses anger, alarm or resentment in others* on the basis of race, color, creed, religion or gender commits disorderly conduct . . . .

St. Paul, Minn. Legis. Code Sec. 292.02 (1990) (emphasis added). Beyond the clear language, the Minnesota Supreme Court construed the ordinance as *limited* to a category of *speech*—fighting words. *See R.A.V.*, 112 S. Ct. at 2542.

From this starting point all else in *R.A.V.* follows, without relevance to statutes which do not concern a category of speech. *R.A.V.* holds that the general exclusion of a category of speech like "fighting words" from First Amendment protection does not permit content-based regulation within the category of speech. This holding does not pertain to a statute concerning targeted predicate crimes.

C. No First Amendment Interest Is Implicated By The Illinois, Wisconsin, And Ohio Hate-Crime Statutes.

Unlike in Minnesota, the Illinois, Wisconsin, and Ohio hate crimes statutes do not involve a category of speech, protected or generally unprotected by the First Amendment, or the effect of speech on listeners. Rather, they target longstanding criminal acts unrelated to constitutional provisions for freedom of speech, such as criminal trespass to vehicle and misdemeanor theft, committed because of the status of group members within our society.

The underlying criminal acts are not speech. If committing a crime were considered protected constitutional expression, all law enforcement would be unconstitutional. *Any* criminal act could be said to express some idea, such as frustration, anger, or disrespect. The thief communicates "I want what you have." The First Amendment does not cover criminal conduct under the guise of expression.

While the Illinois and St. Paul laws similarly address acts committed "on the basis of" various characteristics (St. Paul) and "by reason of" various characteristics (Illinois), this aspect played no part in the *R.A.V.* analysis until it was determined that the predicate conduct was a form of speech. As Professor Laurence H. Tribe stated in congressional testimony concerning the proposed federal hate crimes act, "the trigger for enhanced punishment . . . differs completely from the constitutionally problematic trigger for punishment under the St. Paul ordinance struck down by the Supreme Court in the *R.A.V.* case." Statement of Laurence H. Tribe on H.R. 4797, the "Hate Crimes Sentencing Enhancement Act of 1992" at 2.

The targeting of otherwise non-speech *crime* committed "by reason of" the status of the victim does not transform crime into speech, nor does it prefer expression of certain *ideas* over others. Rather, it recognizes the greater harm done by criminals who physically select and victimize those with the specified characteristics. The bigot can shoot verbal arrows freely so long as the arrows do not take the form of predicate crimes. The statute punishes particularly harmful crime, not particularly disfavored speech.

D. Greater Harms Deserve Greater Penalties.

Hate crime statutes in Illinois, Wisconsin, and Ohio punish the greater harm caused to the victim, the group, and society as a whole than where a victim is selected randomly or based on private relationships. Because the crime is more harmful, there is a rational basis for legislation of separate or greater punishment.

Hate crimes subject particular victims to the humiliation of knowing that they have been selected because of

immutable or core characteristics. Beyond the individual victim, hate crimes intimidate an entire community left to feel vulnerable and fearful. The implication to each member of the community is that he or she may be the next victim. This often causes criminal acts to "escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11, 13 (1984). Ultimately, hate crimes damage the fabric of our entire society as they attempt to unravel the opportunities of group members to participate freely in the greater community.

Crimes causing greater harms warrant greater penalties. Specifically, there is nothing novel about increasing punishment for crimes that are particularly harmful because of the status of the victim. Illinois statutes criminalize or increase the classification of certain crimes committed against members of groups such as children or the elderly, *see e.g.* Ill. Rev. Stat. ch. 38, pars. 12-4.3 and 4.6 (aggravated battery of a child or elderly person); Ill. Rev. Stat. ch. 38, pars. 12-14(a)(5) and (b) (aggravated criminal sexual assault of elderly person or minor); disabled individuals, *see e.g.*, *id.* par. 12-14(a)(6) (aggravated criminal sexual assault of a physically handicapped person); Ill. Rev. Stat. ch. 38, par. 65-1 (denial of use of public accommodations to blind persons); and police officers, *see e.g.* Ill. Rev. Stat. ch. 38, par. 9-1(b)(1) (murder of police officer is aggravating factor). Moreover, the Illinois sentencing code permits enhanced penalties where a crime victim is over sixty years old, *see* Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(8), or handicapped, *see id.* at par. 1005-5.3.2(9). These crimes and increased penalties properly reflect the degree of harm done to society when a criminal preys on members of particular groups.

Illinois has a legitimate interest in securing the rights of all people to participate in a tolerant society; to exchange beliefs and ideas, live where they like, school their children where they choose, work where their talents lead them, and generally live free from fear of criminal retaliation because of their inherent or core characteristics. As this Court wrote in *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941):

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuse. The authority of a municipality to impose regulations in order to assure the safety . . . of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

Targeted criminal acts have no place in the marketplace of ideas; indeed, they prevent it from serving as a forum open to all.

E. The Hate-Crime Statutes Do Not Punish Motive.

It is a fallacy to assume that hate crimes statutes punish motive. The "by reason of" language of the Illinois statute does not punish motive. The statute is not concerned with what prompts an offender to target a group member as a crime victim. A person could not be prosecuted for having bigoted *thoughts*, even thoughts about victimizing someone within a certain group. Rather, the statute operates when an offender acts upon such thoughts and commits a crime.

The language of the statute could just as well prohibit the commission of the predicate crimes against a member

of the specified groups "with the intent to commit the crime against a member of such group." Given that this wording would achieve the full objective of the statute, it is clear that motive is not at issue. Intentional physical selection of vulnerable victims is.

The Wisconsin statute is indeed worded in terms of intent. Yet the Wisconsin Supreme Court assumed that the legislature's concern was motive, not intent. *See Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807, 812 (1992). This assumption reflects the erroneous belief of the court that the only difference between the underlying crimes and the hate crime is the motive or reason for commission of the former. *See id.* at 812-13. In fact, the real difference is the targeted assault based on group status. The Wisconsin court could not be more wrong in concluding that the hate crime statute enhances punishment for individuals "because they are bigoted." *Id.* at 814. The bigot is free to think or say what he or she will about others. Each of us must accept the right of others to say what they think. Choosing an individual for crime victimization, however, is no longer a thought or expression but an act. A person need not live in fear of crime because of some characteristics shared by a larger group. "No person is subject to punishment under the [Oregon] Intimidation Law merely for holding or expressing opinions that are inimical to others because of their race, color, religion, national origin or sexual orientation. The focus of the statute is to forbid a result: physical injury." *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115, 1119 (1991).

The thought process inherent in intentional selection of a victim is not protected speech. Virtually the entire Illinois criminal code, as in other jurisdictions, relies on proof of intent (indeed, this element of proof operates for the

protection of those who commit acts without *mens rea*). With specific intent crimes, the State must prove that an individual does an act with a further object.[7] Under each of these statutes, the State must prove beyond a reasonable doubt the thought process of the offender in committing one act with a further purpose in mind. Similarly, when one intentionally commits a predicate crime against a particularly vulnerable victim, regardless of the motivation, the State can prosecute accordingly.

F. Penalizing Criminal Motivation Does Not Penalize Expression.

Even if hate-crime statutes were concerned with motive, the First Amendment does not protect motives for the commission of crimes. Judges routinely consider motives in determining appropriate sentences. It would offend our sense of justice to think that severity of sentences could not reflect the difference between benign and malevolent motives. A sentence should reflect, for instance, the difference between crimes committed out of need and greed. Motive is relevant to the offender's culpability and rehabilitative potential.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), this Court determined

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[7] Examples include burglary, Ill. Rev. Stat. ch. 38, par. 19-1 (entering with intent to commit a felony); forgery, Ill. Rev. Stat. ch. 38, par. 17-3 (making a document with intent to defraud); obstruction of justice, Ill. Rev. Stat. ch. 38, par. 31-4 (committing various acts with intent to prevent apprehension or obstruct prosecution); solicitation, Ill. Rev. Stat. ch. 38, par. 8-1 (encouraging another with intent that an offense be committed); conspiracy, Ill. Rev. Stat. ch. 38, par. 8-2 (agreeing with another with intent that offense be committed); and arson for fraud, Ill. Rev. Stat. ch. 38, par. 20-1(b) (damaging property with intent to defraud insurer).

that motivation such as racial hatred is appropriate sentencing aggravation where relevant to commission of the crime. *Dawson* and *Barclay* dispose of the claim that the First Amendment protects criminal motives, even with regard to matters such as race. The Wisconsin Court proves as much by nonsensically conceding that "of course" it is proper as in *Dawson* to consider evil motives in punishing, while claiming that it is different and improper to create a "separate enhancer" for the same evil motive. *See Mitchell*, 485 N.W.2d at 815 n.17. Since the Constitution is not offended when judges consider motive, it cannot be offended by legislation of the same consideration.

G. The Hate-Crime Statute Is Only A Legitimate Extension Of Anti-Discrimination Laws.

The numerous criminal and civil anti-discrimination statutes in Illinois, as in federal law, are precisely analogous to the hate crime statutes in prohibiting actions committed "because of" characteristics of the victim where such targeted actions cause particularly undesirable harms.[8] The acts underlying federal and state anti-discrimination laws, such as hiring and firing, are not inherently objection-

[8] Illinois laws prohibit "unlawful discrimination," defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service," Ill. Rev. Stat. ch. 68, par. 1-103(Q), in areas such as employment, *see id.* par. 2-102; real estate transactions, *id.* par. 3-102; financial institution loans, *see id.* par. 4-102; issuance of credit cards, *see id.* par. 4-103; and denial of enjoyment of public accommodations, *see id.* par. 5-102. Criminal sanctions apply to certain unlawful discrimination such as in the sale and purchase of real estate, *see* Ill. Rev. Stat. ch. 38, par. 70-51, and the interference with participation in educational activities of a child afflicted with a chronic infectious disease, *see* Ill. Rev. Stat. ch. 38, par. 12-7.2.

able or discriminatory. What is sanctioned is the selection of a particular individual because of group status. In disparate treatment law, employers are free to perform these acts with impunity *absent discriminatory motive.* Disparate treatment is unlawful for precisely the reason that hate crimes are: the selection of a target from within a protected class. The cases identify *motive* as the issue. " 'Under the *disparate treatment* theory, proof of a discriminatory motive is critical. . . .' (*International Brotherhood of Teamsters v. United States* (1977), 431 U.S. 324, 335 n.15. . . .)" *Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265, 269 (1990).[9] Just as targeting of victims properly transforms lawful acts into prohibited acts, so it transforms lesser crimes into greater crimes. Reversal in this case will remove the cloud unnecessarily hanging over all anti-discrimination laws.

H. Freedom Of Speech Does Not Preclude Use Of Speech As Evidence Of Crime.

Use of an offender's words or associations as evidence of guilt is not only constitutional but a principal means of obtaining convictions in many criminal trials. This Court should review this case to correct the alarming misimpression that any resulting "chilling effect" creates a constitutional barrier to use of speech as evidence.

This Court in *Dawson* found that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected

[9] Illinois anti-discrimination law follows the law applicable to federal claims under Title VII. *See Board of Trustees v. Knight*, 163 Ill. App. 3d 289, 294, 516 N.E.2d 991 (1987).

by the First Amendment." 112 S. Ct. at 1097. Where a crime is one of racial hatred, such evidence is relevant aggravation. *See id.* at 1098-99.

The rules of evidence allow the use of a defendant's relevant statements before, during, or after commission of a crime as proof of any element of the crime. "I hate Joe and want to kill him," "This is the end, Joe," and "I confess I killed Joe" are classic evidentiary components. If the First Amendment prohibited use of a person's speech as evidence, the Fifth Amendment's more narrow preclusion of compelled self-incrimination would be superfluous. There is no basis for reading the First Amendment as a prohibition on self-incrimination uncompelled by the State.

CONCLUSION

The decisions of the Wisconsin and Ohio Supreme Courts are wrong on their own terms and in their potential application to hate-crime statutes like that in Illinois. Furthermore, if uncorrected, the erroneous reasoning of the decisions will support time-consuming, unwarranted attacks on much of the criminal code and rules of evidence in criminal proceedings and the entire body of anti-discrimination laws. To demonstrate the limited scope of this Court's ruling in *R.A.V.*, and to curtail the piecemeal challenges sure to come based on these state court decisions, the People of Cook County, Illinois respectfully ask this Court to grant certiorari and reverse the judgments in these cases.

Respectfully submitted,

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Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*
v.
TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, *Respondent.*

STATE OF OHIO, *Petitioner,*
v.
JAMES MAY, JR., et al., *Respondents.*

STATE OF OHIO, *Petitioner,*
v.
CLANCY VAN GUNDY, et al., *Respondents.*

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Chicago Lawyers' Committee") moves this Court for leave to file the attached brief *amicus curiae* in support of the petitions for writs of certiorari. The written consent of petitioner State of Wisconsin and respondent Todd Mitchell in no. 92-515 has been obtained and filed with the Clerk of this Court. The written consent of petitioner State of Ohio and respondents David Wyant and Robert Blazer in no. 92-568 has been obtained and filed with the Clerk of this Court. The written consent of the remaining respondents in no. 92-568 has been requested but not obtained.

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims. Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned.

The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois. Accordingly, the Chicago Lawyers' Committee requests that this Court grant it leave to file the attached brief *amicus curiae* supporting the petitions for writs of certiorari.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims.

Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned. The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, particularly because of their similarity to the bias violence statute in Illinois.

REASONS FOR GRANTING THE WRITS

I. The Decisions of the Wisconsin and Ohio Supreme Courts Are Inconsistent with Two Recent Decisions of This Court.

The Wisconsin and Ohio Supreme Courts struck down their respective states' bias violence statutes on the grounds that they violated the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992); *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). But the First Amendment is not even implicated in, much less violated by, the Wisconsin and Ohio bias violence statutes.

The Wisconsin statute authorizes the imposition of increased maximum penalties if the person committing the crime "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ." Wis. Stat § 939.645(1)(b). The Ohio bias violence statute enhances the penalty for a person who commits a crime "by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code § 2927.12. In both statutes, discriminatory selection of the victim—selection based on the victim's status—is the essential element of the crimes. In neither statute is expression—either speech or expressive conduct—an element of the crime at all.

The decisions of the Wisconsin and Ohio Supreme Courts are directly contrary to this Court's decision last term in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). In *R.A.V.*, this Court clearly stated: "When a government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. The St. Paul, Minnesota

ordinance at issue in *R.A.V.* was, by its terms, directed at the content of expression. Indeed, it regulated expression based upon the viewpoint contained in the message. In contrast, both the Wisconsin and the Ohio statutes regulate conduct without regard to expression. At most, any impact on speech is incidental. And clearly "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The Wisconsin and Ohio bias violence statutes do not in any way restrict the ability of a person to believe anything or to hate anyone; they simply punish committing a crime against someone because of that person's status.

The decisions of the Wisconsin and Ohio Supreme Courts are also inconsistent with this Court's decision last term in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, this Court clearly held that the Constitution does not preclude the admission of relevant evidence "concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. *See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding admission of evidence of racial animus in capital sentencing proceeding). There is no logical or legal basis for allowing a judge or jury to consider discriminatory victim selection in determining the imposition of criminal penalties while forbidding a legislature from doing so.

In short, the decisions of the Wisconsin and Ohio Supreme Courts are based on a seriously erroneous reading of the limits imposed by the First Amendment and are inconsistent with this Court's recent decisions in *R.A.V.* and *Dawson*.

II. The Decisions of the Wisconsin and Ohio Supreme Courts, If Followed, Would Erroneously Invalidate All Other Bias Violence Statutes in This Nation and Call Into Question the Validity of Federal and State Antidiscrimination Statutes.

Nearly every state in this nation has enacted some form of bias violence statute. Anti-Defamation League of B'nai B'rith, *ADL Law Report, Hate Crimes Statutes: A 1991 Status Report* 22-23. Moreover, many states (including Wisconsin, Ohio, and Illinois) provide victims of bias violence with a civil remedy. *Id.* The decisions of the Wisconsin and Ohio Supreme Courts striking down their respective states' bias violence statutes are so broad that, if followed, they would invalidate all other bias violence statutes in this nation.

In addition, the operative language of both federal and state antidiscrimination statutes is the same as or substantially similar to the operative language in the Wisconsin and Ohio bias violence statutes. Because there is no principled distinction between antidiscrimination statutes and the bias violence statutes struck down by the Wisconsin and Ohio Supreme Courts, these decisions call into question the validity of antidiscrimination laws throughout our nation.

III. There Is a Conflict Between State Courts of Last Resort Concerning the Constitutionality of Bias Violence Statutes.

The Oregon Supreme Court has upheld the constitutionality of Oregon's bias violence statute, specifically rejecting the reasoning adopted by a majority of the Wisconsin Supreme Court in *Mitchell. State v. Plowman*, 314 Or. 157, 1992 WL 207677 (August 27, 1992). The different results reached by the Wisconsin and Ohio Supreme Courts

on the one hand and by the Oregon Supreme Court on the other appear to be based on their differing readings of this Court's decision last term in *R.A.V.* Because of the importance of the issues involved, this Court should resolve the conflict.

CONCLUSION

Nothing threatens to unravel the fabric of our heterogeneous society more than violence directed at persons because of immutable characteristics such as their race or religion. Yet, under the mistaken belief that the First Amendment prevents the states from providing a remedy for bias violence, the Wisconsin and Ohio Supreme Courts have struck down statutes that provide such a remedy. This Court should grant the petitions for writs of certiorari to make clear that the First Amendment does not bar the states from providing a remedy for bias violence.

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Nos. 92-515 and 92-568

IN THE

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OCTOBER TERM, 1992

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TODD MITCHELL, *Respondent.*

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to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, *Respondent.*

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Brief of *Amici Curiae* States of Illinois, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont, Washington, and West Virginia in Support of Petitioners

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INTEREST OF THE AMICI CURIAE

The Amici States, through their attorneys general, respectfully submit this brief in support of the petitioners in two cases, *Wisconsin v. Mitchell*, No. 92-515, and *Ohio v. Wyant*, No. 92-568, urging this Court to grant the petitions for writ of certiorari and reverse the decisions of the Wisconsin Supreme Court and Ohio Supreme Court. This case provides the Court with the opportunity to review the constitutionality of hate crime statutes significantly different from the one struck down in *R.A.V. v. City of St. Paul*, 505 U.S. ____, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), namely, the various forms of "penalty enhancement" statutes that authorize sentencing judges to impose more severe sentences on criminals whose crimes were motivated by discriminatory intent.

Amici States have a substantial interest in combatting the pernicious effect of hate crime on its victims and society as a whole. Consequently, the Amici States, among others, have passed hate crime statutes in response to such a problem. Some of the statutes are substantially similar to the Wisconsin and Ohio laws that were struck down by their state supreme courts. An example is an Illinois statute that provides in relevant part:

> Factors in Aggravation. (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence under Section 5-8-1:
>
> * * *
>
> (10) the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender,

> sexual orientation, physical or mental disability, or national origin. . . .

Ill. Rev. Stat. ch. 38, ¶ 1005-5-3.2 (1991).[1]

Amici States believe that not only are penalty enhancement, and indeed all, hate crime laws vulnerable to challenge based on the faulty analysis employed by the courts below, but that their civil discrimination laws may also be vulnerable. These laws contain operative language found in the hate crime statutes struck down by the courts below. Amici States have a strong interest in the continued validity of antidiscrimination statutes that form the very foundation of civil rights laws in their states. This Court is urged to grant the petitions for writ of certiorari to explore fully the First Amendment implications of penalty enhancement statutes and to consider the impact of recent rulings on the many state and federal antidiscrimination laws that target conduct based on specified motivation.

SUMMARY OF ARGUMENT

Recent news coverage has revealed the serious and growing national problem of hate crime. States have a substantial interest in fighting the pernicious effect hate crime has on its victims and society as a whole. Amici States submit that they may constitutionally fight this problem as an exercise of their traditional police powers. Some states

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[1] Illinois has also enacted a substantive hate crime statute, under which the commission of certain crimes "by reason of" the race, color, creed, religion and other specified characteristics of the victim is subject to penalties (Ill. Rev. Stat. ch. 38, ¶ 12-7.1 (1991)). Further examples of statutes allowing a defendant's bias motive to be considered as a factor in sentencing include N.J. Stat. Ann. § 2C:44-3; N.H. Rev. Stat. Ann. § 651:6I(g).

have responded to the stubborn problem of hate crimes by passing statutes that enhance the penalty for certain predicate offenses committed "because of" or "by reason of" the victim's race, religion, or other protected class. Two of these statutes, Wis. Stat. § 939.645 and Ohio Rev. Code § 2927.12, have recently been struck down by their respective state supreme courts. Those courts relied for their holdings on a faulty analysis of *R.A.V.* and other federal decisions that discuss the reach of the First Amendment.

Many states have penalty enhancement hate crime statutes substantially similar to the statutes struck down. These statutes would be vulnerable to challenge under the analyses employed by the courts below. Furthermore, most if not all states have civil antidiscrimination laws that contain operative language the same as or similar to the operative language in the hate crime statutes struck down; thus, these laws are also vulnerable under the reasoning of the courts below. Because the holdings of those courts will have such far-reaching impact on First Amendment jurisprudence at the state court level, this Court should rectify the lower courts' analyses and uphold the constitutional validity of penalty enhancement hate crime statutes and state antidiscrimination laws.

Finally, other state courts have upheld or are currently reviewing similar hate crime statutes against First Amendment challenges. Granting the petitions for writ of certiorari, therefore, will give this Court an opportunity to resolve a conflict among state courts as to the appropriate reach of the First Amendment to penalty enhancement hate crime statutes.

ARGUMENT IN SUPPORT OF CERTIORARI

I.

THE SERIOUS AND GROWING PROBLEM OF HATE CRIME REQUIRES AN APPROPRIATE STATE LEGISLATIVE RESPONSE.

On January 6, 1992, in New York City, it was reported that a 14-year old black male and his 12-year old sister were jumped by four white teenagers who beat them, robbed them of $3.00, shaved off the girl's hair, and sprayed them with white shoe polish while shouting, "You'll be white today!" Glave, *Hate Crime Against Children Sparks Concern In A Hard Town*, The Associated Press, January 10, 1992, Domestic News Section (*"Hate Crime Concern"*). Over the last three years, the number of hate crimes reported to the Chicago police, like the one described above, has been steadily rising. Reardon, *Hate Crimes Touch Raw Nerve In City*, Chicago Tribune, July 8, 1992, at p. 1. Unfortunately, the Chicago experience is not unique; the incidence of hate crimes is up all across the nation,[2] along with a broadening of the perpetrators and targets of hate. Welch, *Tensions Between Clashing Cultures Lead to More Hate Crimes*, The Associated Press, September 9, 1991, Washington Dateline Section. One aspect of this trend as a national phenomenon is well documented by the Anti-Defamation League of B'nai B'rith: the number of anti-

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[2] For example, hate crimes increased 18 percent in 1991 in New Jersey, which was the fourth year in a row of an increase in reports of hate crimes. Gray, *Bias Crime Rate Up 18%, And Juveniles Led The Surge*, New York Times, April 4, 1992, § 1 at 29. In Los Angeles County, hate crimes reached record levels in 1991 for the seventh consecutive year, an increase of 22% over 1990. Chavez, *Hate Crimes Set A Record in L.A. County*, Los Angeles Times, March 20, 1992, § A at 1 (*"L.A. Hate Crimes"*).

Semitic incidents committed across the nation during 1990 was the highest total ever reported in the 12-year history of the ADL's study of the problem. *Hate Crimes Statutes: 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991) at p. 1 ("ADL Status Report"). "Everyone who collects data reports a steady increase in hate crimes in the last year or two." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, New York Times, May 29, 1990, § C at 1 ("*Roots of Racism*").[3]

In addition to the unsettling trend toward a higher incidence of hate crimes, the violent nature of the crimes and the effects on the victims and society at large are particularly disturbing. Scientists have found that hate crimes are often vicious; for example, hate crime assaults are "far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than is true for other assaults." *Roots of Racism, supra.* Furthermore, the level of violence is increasing. *L.A. Hate Crimes, supra.* Nevertheless, hate crimes often "wound the psyche more than the body and leave a residue of painful distrust and fitful dreams." Kleinfield, *Bias Crimes Hold Steady, But Leave Many Scars*, New York Times, January 27, 1992, § A at 1. Moreover, all members of a victim's group are affected by a hate crime, and some act

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[3] *See also*, Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270, 1270 (1988) (Article cited sources that found "an alarming trend of increased racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country"). Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 Yale L.J. 845, 846 (1990); Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 103 (1984).

out their anger by responding with counterattacks. *Hate Crime Sparks Concern, supra.* Because a hate crime may escalate into mob violence, these crimes have potential impacts on the community that differ from those resulting from similar acts committed without a bias motive. As the American Bar Association Section of Criminal Justice reported:

> [M]any criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.* The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, Criminal Justice, Summer 1988, at 19, 20 (emphasis in original).

Clearly, states have a substantial interest in fighting the devastating effect that hate crime has on its victims and society as a whole, as outlined above.[4] Furthermore, combatting hate crime is obviously within the constitutional power of the states as exercises of their traditional police powers to protect the health, safety and welfare of their citizens. State laws that enhance the penalties for hate crime are a rational way to apply that police power. These laws are not directed at the expression of ideas, but are meant to regulate conduct of a particularly malicious type.

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[4] The federal government, as well as the states, has recognized the need to address by statute the problem of bias-motivated crime; it has already addressed the consummate hate crime, genocide, 18 U.S.C. § 1091 *et seq.*, and has proposed H.R. 4797, "The Hate Crimes Sentencing Enhancement Act of 1992."

Amici States submit that hate crime is conduct and does not implicate free expression at all. Any expressive element that may be involved in the conduct is merely "swept up incidentally within the reach of [the] statute." *R.A.V.*, 505 U.S. at ____, 112 S. Ct. at 2546, 120 L. Ed. 2d at 321. Moreover, the legislative response of enacting penalty enhancement statutes is no greater than necessary to achieve the governmental interest of fighting this especially pernicious class of crimes. By treating bias-motivated crime as something more egregious than the predicate offense, states send an important message to the perpetrators of hate crimes that the increased harm to victims and society from their conduct will be punished accordingly. Thus, the imposition of a greater penalty for hate crime is not merely rationally related to the purpose of combatting such crime, it is closely tailored to the greater societal harm created by hate crime.

II.

THIS COURT SHOULD GRANT THE PETITIONS FOR WRIT OF CERTIORARI TO REVIEW THE SPECIFIC PROVISIONS OF THE WISCONSIN AND OHIO STATUTES IN ORDER TO CLARIFY THE CONSTITUTIONALITY OF STATE STATUTES WITH THE SAME OR SIMILAR LANGUAGE.

In their efforts to combat bias-motivated crime, states have adopted a variety of measures.[5] One approach was recently struck down by this Court as a regulation of speech in violation of the First Amendment of the United States Constitution. *R.A.V.*, *supra*. Another approach, substantially different from the one examined in *R.A.V.*,

[5] According to the ADL Status Report, 46 states have some type of hate crime law.

provides enhanced penalties for criminal activity that is motivated by bias. Two statutes of the latter type, Wis. Stat. § 939.645 and Ohio Revised Code § 2927.12, were recently struck down by the supreme courts in their respective states, whose holdings relied on an analysis of *R.A.V.* *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992), and *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). Although the constitutional issues presented in reviewing the two statutes are similar, the statutes are worded differently. While Amici States believe both statutes are constitutional, the allowance of both petitions will give the Court an opportunity to discuss fully the permissible range of alternative legislative enactments to combat hate crime.

1. Examining The Difference Between The Wisconsin And Ohio Statutes Will Guide States In Evaluating Their Own Hate Crime Statutes.

Wis. Stat. § 939.645, at the time of the defendant's crimes in *Mitchell*,[6] provided for an increase in the penalty to be exacted for the underlying crime if a person:

> Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Although the basic thrust of Ohio Rev. Code § 2927.12 is the same, the language differs substantially:

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[6] The May 1992 amended version of the Wisconsin statute is discussed in a footnote of the *Mitchell* opinion. See Appendix to petition for writ of certiorari in *Wisconsin v. Mitchell* at A.12-A.13.

(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code *by reason of the race, color, religion, or national origin of another person or group of persons.*

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation. (Emphasis added).

The two statutes differ in several respects. The Ohio law enhances the penalty for particular predicate offenses by creating an independent offense of ethnic intimidation, whereas the Wisconsin law enhances the penalty for particular predicate offenses by simply changing the scope of penalty allowable for the predicate offense. Moreover, the Wisconsin statute specifically requires intentional selection, whereas the Ohio statute accomplishes the same goal simply through the use of "by reason of" language. Further, the Ohio statute protects a person who is victimized because of his association with a "group of persons" and is thus broader in the range of people covered than the Wisconsin statute, which is limited to persons chosen as victims only because of their own characteristics. Finally, the Wisconsin statute includes more protected classes of persons and different predicate offenses than the Ohio law. Both statutes are, however, fairly included in the category of penalty enhancers and both are distinguishable from the ordinance struck down in *R.A.V.* Determining that both these legislative responses to the problem of hate crime are constitutional will help states determine that their particular penalty enhancement hate

crime statutes are permissible under the First Amendment.

2. Civil Antidiscrimination Laws May Be Vulnerable Under The Reasoning of *Mitchell* and *Wyant*.

Most, if not all, states have statutes similar to Title VII that prohibit discrimination on account of race, color, religion or other protected classes. *See, e.g.*, Ill. Rev. Stat. ch. 68, ¶¶ 1-101 *et seq.* (1991). These statutes contain language the same as or similar to the "because of" or "by reason of" language found in the hate crimes statutes at issue here, thus similarly leading a fact finder to examine the discriminatory action of the perpetrator. For instance, some antidiscrimination statutes prohibit discrimination in housing "because of race, color, religion, sex, or national origin." Ohio Rev. Code § 4112.02(H).[7] These antidiscrimination statutes are constitutional because:

> [a]s long as it is the underlying discriminatory behavior that is being regulated, the First Amendment is not offended, for under the analysis in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968)] the penalty exacted on speech in such cases is incidental to the governmental purpose of regulating the purely non-expressive component of the conduct.

Statement of Rodney A. Smolla, Arthur B. Hanson Professor of Law and Director of the Institute of the Bill of Rights Law at the College of William and Mary, before the Subcommittee on Crime and Criminal Justice of the

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[7] Ohio Rev. Code § 4112.02(H)(12) prohibits any person from intimidating another because of the exercise of any right protected or granted by the section. Ohio also has made criminal the same conduct. *See* Ohio Rev. Code § 2927.03. If one applied the reasoning of the *Wyant* decision, the validity of this criminal statute and its civil counterpart obviously would be cast into doubt.

U.S. House of Representatives regarding H.R. 4797,[8] July 29, 1992, at pp. 38-9 (hereinafter referred to as "Smolla Statement").

The constitutionality of penalty enhancement hate crime statutes depends on the same analysis. Thus, if such statutes are struck down because they penalize the harm caused by selecting victims just because of who they are, then antidiscrimination statutes that operate in exactly the same way might similarly be viewed as unconstitutional. The analysis employed by the courts in *Mitchell* and *Wyant* could be used to undermine statutes that form the very foundation of civil rights law in their states. Amici States urge this Court to grant the petitions for certiorari to clarify the continued constitutionality of the many state antidiscrimination laws.

3. The *Mitchell* and *Wyant* Analyses of Federal Case Law Are Flawed.

Not only are the decisions below far reaching, but their analyses of federal case law are fundamentally flawed. Both courts used a simplistic interpretation of *R.A.V.* to support their decision to strike down penalty enhancement hate crime laws. However, as shown above, those laws resemble antidiscrimination statutes which this Court in *R.A.V.* explicitly excluded from its holding:

> since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class

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[8] Bill proposing "The Hate Crimes Sentencing Enhancement Act of 1992," H.R. 4797, 102d Congress, 2d Session (1992).

> of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, ... Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 505 U.S. at ____, 112 S. Ct. at 2546-47, 120 L. Ed. 2d at 321-22 (citations omitted). Thus, contrary to the courts' analyses in *Mitchell* and *Wyant*, "laws that increase the penalties for bias-motivated crimes in which expressive activity *has nothing to do with the elements of the crime* would not seem to be affected by the *R.A.V.* ruling, and should not run foul of the First Amendment." Smolla Statement at p. 41 (emphasis in original). Granting the petitions for certiorari is particularly warranted where, as here, the highest state courts misconstrue federal precedent to support a decision at odds with that precedent.

Furthermore, Amici States urge this Court to grant the petitions for certiorari to overturn state court decisions in direct conflict with *Dawson v. Delaware*, 503 U.S. ____, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). In *Dawson*, this Court found that a court's consideration, in the sentencing phase of a trial, of evidence of the defendant's membership in a white power group was improper because that membership did not motivate the crimes committed. *Id.*, 112 S. Ct. at 1098. However, the Court explained that where the motive is causally connected to the crime at issue, the motive may be considered when determining a sentence. *Id.* at 1097. As Professor Smolla explained, the *Dawson* case thus stands for two propositions relevant to the application of the First Amendment to penalty enhancement hate crimes statutes:

> First, the constitutional protection for freedom of expression extends to the penalty phase of the criminal justice process. Second, . . . it would *not* be constitutionally permissible for federal courts to enhance sentences merely on the basis of evidence that a convicted defendant has "abstract beliefs" that are racist, or is a member in a racist organization. Rather, the sentencing court must base its enhancement on evidence that the specific crime for which the defendant was convicted was in fact motivated by the type of prejudice proscribed by [the penalty enhancement hate crime statutes].

Smolla Statement at p. 6 (emphasis in original). Application of the *Dawson* principles then would lead a court to uphold a penalty enhancement hate crime law *if* it can be shown that the predicate offense resulted from a defendant's discriminatory motive. Thus, by striking down penalty enhancement hate crime statutes under the First Amendment and *R.A.V.*, the *Mitchell* and *Wyant* courts neglected to square their holdings with the important principles enunciated in *Dawson*, and their decisions should be overturned.

4. Granting The Petitions Will Resolve A Conflict In State Court Decisions.

In contrast to the courts' holdings in *Mitchell* and *Wyant*, other state courts have upheld similar statutes. Most notably, the Oregon Supreme Court recently upheld Oregon's hate crime law. *State v. Plowman*, 314 Or. 157, ____ P.2d ____, 1992 Ore. LEXIS 158 (August 27, 1992). The court recognized the limited reach of *R.A.V.*, finding that the Oregon hate crime law "is a law directed against conduct, not a law directed against the substance of speech." *Id.*, 1992 Ore. LEXIS 158 at *20-*21. The court also anticipated a conflict among state supreme courts by specifically disagreeing with the reasoning of *Mitchell*. *Id.*, 1992 Ore.

LEXIS 158 at *22. *See also Dobbins v. State*, 17 Fla. Law W. D2222, 1992 Fla. App. LEXIS 10062 (September 24, 1992).

Other state supreme courts are currently reviewing their states' penalty enhancement hate crime laws. *See State v. Stalder*, 599 So.2d 1280, 1992 Fla. LEXIS 1027 at *1 (Fla. 1992) (Florida Supreme Court accepted jurisdiction to "pass[ ] upon a question of great public importance requiring immediate resolution by this Court"); *State v. LaDue*, No. 91-313 (Vermont Sup. Ct., docketing statement filed March 9, 1992). This Court should grant the petitions for writ of certiorari to resolve a conflict among state courts as to the appropriate reach of the First Amendment to this type of statute.

CONCLUSION

Amici States strongly urge this Court to grant the petitions for writ of certiorari and to determine the constitutionality of penalty enhancement hate crime statutes in general and in the context of the distinctions between the Wisconsin and Ohio statutes, to give direction to the many states with similar statutes and to make clear the continued validity of state antidiscrimination laws.

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CASE NO. 92-568

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

v.

DAVID WYANT,

Respondent.

STATE OF OHIO,

Petitioner,

v.

JAMES MAY, JR., et. al.,

Respondent.

STATE OF OHIO,

Petitioner,

v.

CLANCY VAN GUNDY, et. al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT
NOS. 91-199, 91-1519, 91-1211/1589**

**REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

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QUESTION PRESENTED

WHETHER OHIO REVISED CODE SECTION 2927.12, WHICH PROVIDES FOR A PENALTY ENHANCEMENT IF CERTAIN CRIMINAL CONDUCT IS COMMITTED "BY REASON OF THE RACE, COLOR, RELIGION OR NATIONAL ORIGIN OF ANOTHER PERSON OR GROUP OF PERSONS", VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

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REPLY ARGUMENT

I. INDEPENDENT STATE GROUNDS

The briefs in opposition of both Blazer and Wyant[1] contend the petition for writ of certiorari is barred by "independent state grounds". There is a marked difference in tenor between Blazer's brief, page 15, wherein, "respondent does not strenuously argue that the decision of the Ohio Supreme Court rests on independent state grounds, . . .", and Wyant's brief, which devotes nearly one-half of its text to the issue. Accordingly, this portion of the reply is directed to Wyant's brief.

In an attempt to avoid review on the merits, Wyant has mischaracterized the standard for "independent state grounds," Ohio law, and the decision of the Court below.

Most revealing is Wyant's admission (brief, page 3, footnote 2) that the "Ohio Supreme Court has not been reluctant to hold provisions of the Ohio Constitution to be coextensive with analogous provisions of the federal constitution." Wyant argues, by negative inference, that since the Ohio Supreme Court did not specifically state Article I, 11 of the Ohio Constitution is coextensive with the First Amendment, the lower court did not intend such a result. However, this argument turns this Court's rule on independent state grounds on its head. In *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), this Court established a presumption in favor of review if a lower court did not affirmatively state that its decision was based on independent state grounds. Wyant argues that this Court should presume "independence" from the failure to affirmatively state coextensiveness.

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[1] Two separate briefs in opposition to the petition for writ of certiorari have been filed: one on behalf of respondent Blazer and one filed jointly on behalf of respondents Wyant, Staton, Plessinger, Clancy Van Gundy, Krebs, and Culp (hereinafter Wyant brief). The other respondents either waived or failed to file briefs in opposition.

Wyant had to admit that the Ohio Supreme Court has frequently treated federal and state constitutional provisions the same; there are literally hundreds of cases in which the Ohio Supreme Court has referred to federal and state constitutional provisions in the same breath. To the contrary, Wyant does not identify one case in which the Ohio Supreme Court has ever treated Article I, 11 of the Ohio Constitution as anything but coextensive with the First Amendment. The general rule in Ohio is:

> We look to federal case law to delineate the right of relators under both the state and federal provision. The Ohio Constitution's guarantees in these matters are substantially equivalent to the United States constitution's guarantees.

State, ex rel. Heller v. Miller (1980) 61 Ohio St. 2d 6, 399 N.E. 2d 66 (dealing with equal protection, due process clauses).

Wyant attempts to diminish *State, ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992) 63 Ohio St.3d 354, 588 N.E. 2d 116, cited by petitioner as a case in which the Ohio Supreme Court equated Article I, 11 of the Ohio Constitution and the First Amendment. In that case, the Ohio Supreme Court was specifically asked to adopt a broader reading of the Ohio Constitution, since this Court had already rendered a First Amendment opinion relating to similar facts. Wyant correctly states that the Ohio Supreme Court adopted the decision of an intermediate appellate court and did not write its own opinion. However, Wyant ignores that the Ohio Supreme Court "affirmed on the *authority* of the court of appeals' decision below". *Rear Door Bookstore*, 63 Ohio St.3d at 355. (Emphasis added). Wyant's argument that *Rear Door Bookstore* is not precedent since there is no syllabus is mistaken. The unanimous adoption of a lower court opinion is analogous to a *per curiam* opinion, which is one "concurred in by all the judges concurring in the judgment." *State, ex rel. Keller v. Forney* (1923) 108 Ohio St. 463, 468, 141 N.E. 16. Such an opinion is precedent under Ohio law. *State ex rel. Canada v. Phillips* (1958) 168 Ohio

St. 191, 151 N.E.2d 722 (paragraph 6 of the syllabus). ("[A]n opinion *per curiam* or by the court represents a pronouncement of law by this court.") *See* Rule 1(C) of the Ohio Supreme Court Rules for the Reporting of Opinions (1983).

This Court in *Michigan v. Long*, *supra*, recognized the need to insure uniformity of decision making with respect to federal constitutional claims. If all that was necessary to preclude review was reference to a coextensive state constitutional ground, then this Court would not be able to review a federal constitutional claim no matter how erroneous the decision, and no matter that the state constitutional ground was dictated thereby. *See* Lewin, *Avoiding the Supreme Court*, New York Times, October 17, 1976 (magazine). While a state court is certainly free to act independently on matters of state constitutional law, this Court did not ask too much of such courts in requiring a statement free from doubt that independence of result was intended.

Admittedly, the decision of the court below states that both Article I, 11 of the Ohio Constitution and the First Amendment to the federal constitution are violated by Ohio's penalty enhancement law. However, the lower court in *Michigan v. Long* had also made a dual constitutional reference. *See People v. Long*, 413 Mich. 461, 472; 320 N.W. 2d 866, 870 (1982). Like in *Michigan v. Long*, reference to the opinion of the lower court herein shows that independence of result was not stated or intended.[2]

There are 9 references in the opinion to the Ohio Constitution. In each instance, the Court links the Ohio Constitution and the federal constitution. Furthermore, the Court's constitutional analysis is intertwined as all pertinent citations to case law are to the First Amendment decisions

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[2] In *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1985), this Court faced the same situation. The Ohio Supreme Court's syllabus referred to both the state and federal constitutions. The opinion of the lower court showed that the state constitutional decision was predicated on interpretation of federal constitutional law.

of this Court. Moreover, the Court also independently analyzed the First Amendment without any reference to the Ohio Constitution. Petition, appendix, A-13; *State v. Wyant* (1992) 64 Ohio St.3d 566, 574-5, 597 N.E. 2d 450.

Wyant selectively quotes from *California v. Freeman*, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989) to support the independent state ground argument. That case provides a perfect example where this Court found that a state court's discussion of its penal code expressed the dispositive holding of the case and was not interwoven with its discussion of federal law: "Discussion of federal law - specifically the First Amendment - is strictly confined to the second subsection and constitutes an independent alternative holding." This is precisely *not* the situation in the instant case where the Court's discussion of the Ohio Constitutional provision is closely intertwined with its discussion of the First Amendment and this Court's pronouncements regarding the same.

Wyant cites only to one quote in *Wyant:*

> The freedoms of speech, press, religion, and assembly are guaranteed together in the First Amendment because they share a core value; the freedom of an individual to frame his thoughts and beliefs. The constitution of Ohio is even more specific; it guarantees to every citizen freedom to 'speak, write, and publish his sentiments on all subjects' ".

Petition, appendix, A-16; *Wyant*, 64 Ohio St.3d at 577. The Ohio Supreme Court's opinion does not state that the protections of the Ohio Constitution are broader than the federal constitution. Rather, the Ohio Constitution is more specific in enunciating the same core values it shares with the First Amendment. Rather than showing independence, the quote confirms coextensiveness.

II. *R.A.V.*

Both briefs in opposition assert that the issue presented is controlled by this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. ___ , 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992). Even were that accurate, it is not necessarily a ground for denying certiorari. In either event, this case presents a vehicle for elaboration of *R.A.V.* . The cavalier assertion that *R.A.V.* is this Court's last word, however, is belied by the care which the Court took to indicate the narrowness of the question being decided. This case involves a far different statute than the one examined in *R.A.V.* and presents a very open question indeed.[3]

Respondents' mistaken reliance on *R.A.V.* is illustrated by Wyant's statement (brief, page 7) that "fighting words" are "the category ostensibly at issue in the present case". "Fighting words" is a concept justifying the direct regulation of speech. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). This case does not involve "fighting words" since the Ohio statute is aimed at conduct, not speech.[4]

As this Court stated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed. 2d 672, (1968):

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[3] Respondents do not dispute that there is a conflict of state court decisions as contended in the petition. Indeed, the Oregon Supreme Court's opinion upholding their penalty enhancement law was rendered one day after the decision of the court below. *State v. Plowman*, 314 Ore. 157, ___ P.2d ___ , 1992 Ore. LEXIS 158 (1992) *See also Dobbins v. Florida*, 1992 Fla. App. LEXIS 10062, 17 Fla. L. Weekly D2222 (September 24, 1992). The issue involved in this case is now before the Florida and Vermont Supreme Courts and petitioner is aware of lower court cases in California, Idaho, Michigan, and Pennsylvania. The issue both deserves and demands an answer.

[4] The underlying predicate offenses of R.C. 2927. 12 include both acts of physical conduct, such as criminal mischief, and acts of verbal conduct, such as telephone harassment. Analysis of the constitutional issues does not, in petitioner's view, depend on the type of conduct involved.

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.

391 U.S. at 376. This Court recently reiterated this basic principle in *R.A.V.*:

> Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

505 U.S. at ___ , 112 S. Ct. at 2546-7, 120 L.Ed. 2d at 321-22.

Extending the erroneous premise that the Ohio statute is aimed at speech, not conduct, Wyant argues that the "additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint". Wyant brief, page 8. The amici briefs filed in support of the petition by numerous states and diverse organizations vividly counter that contention by referring to actual examples of the crimes the Ohio statute is designed to redress. Increased punishment is justified not by the offensiveness of the message, but by the real harm caused to people who are threatened, harassed and assaulted simply because of who they are. Congress itself has recognized the special harm caused by "hate" crimes. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. Extensive scholarly literature notes increased victim impact, and the potential for societal disruption in retaliatory acts. Respondents falsely construe Ohio's statute as intending to punish offensive speech. A real harm exists which Ohio and the legislatures of most other states have sought to address.

Respondents go on to argue that Ohio may punish "harm" through content neutral statutes. Wyant even suggests two examples: "with specific intent to create terror in a definable community" and "with specific intent to issue a threat of further crime". Aside from the fact that respondents would

assuredly claim such statutes are vague, the argued need for such statutes confuses "content based" with "conduct based". A content neutral statute is not required when a statute is directed at conduct rather than speech and does not target that conduct on the basis of expressive content even if the conduct expresses a discriminatory idea or philosophy. *R.A.V.*, 505 U.S. at ___ , 112 S.Ct. at 2546-7, 120 L.Ed.2d at 321-22. The Ohio law is precisely that kind of statute.

Respondents also minimize the threat to other discrimination statutes posed by the reasoning of the court below. Respondents argue that such statutes are not before the Court, and in any event, discrimination statutes are directed against the act of discrimination, not discriminatory thought. However, the threat to other civil rights laws and the superficial nature of the distinction between those laws and "hate crime" legislation have been the subject of extensive commentary to the contrary. One example:

> . . . if the First Amendment or any other provision of the Bill of Rights were to require governmental indifference to the racial or otherwise bigoted motive underlying a hurtful act, it would follow that an enormous body of anti-discrimination law, both state and federal, would be unconstitutional.
>
> * * *
>
> For the distinction is one that will, in the end, crumble under analysis . . . .

Testimony of Laurence Tribe, Tyler Professor of Constitutional Law, Harvard Law School, before the Subcommittee on Crime and Criminal Justice of the U.S. House of Representatives regarding H.R. 4797, Hate Crimes Sentencing Enhancement Act of 1992, July 29, 1992, at page 5. The Court should accept certiorari precisely to examine the purported distinction.

Finally, respondents offer an interpretation of *Dawson v.*

Delaware, 503 U.S. ___ , 112 S. Ct. 1093, 117 L.Ed. 2d 309 (1992) which is more an admission in petitioner's favor, than a distinction against granting certiorari. Wyant's brief, page 12, states, "Racist sentiment, although protected by the First Amendment, may, like anything else, be used as evidence of content-neutral sentencing factors." Wyant agrees that racial animus is relevant during the sentencing phase of a trial when assessing the harm to the victim. Yet, Wyant makes an unfounded leap of logic that a legislature may not make the same assessment without turning "racist sentiment" itself into a sentencing factor. Ohio's statute does not make racist sentiment a sentencing factor. The legislature has determined, like the sentencer in *Dawson*, that discriminatory selection of a victim is evidence of increased harm. When the state proves beyond a reasonable doubt that the offender committed the underlying predicate offense "by reason of race" etc., it is proof that the content-neutral factor of "increased harm" should be imposed. Respondents' attempt to distinguish *Dawson* is without substance and this Court should accept certiorari to so hold.

For the above reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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Supreme Court, U.S.
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CASE NO. 92-515
CASE NO. 92-568

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

STATE OF OHIO,

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v.

DAVID WYANT, *ET AL.*,

Respondents.

On Petitions for Writ of Certiorari
to the Supreme Courts of Wisconsin and Ohio

BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, ET AL. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal statute providing enhanced penalties where a victim is selected "because of" or "by reason of" his or her actual or perceived race, religion, color, disability, sexual orientation, national origin or ancestry is unconstitutional under the First Amendment.

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2. TO CLARIFY THE BASIS UNDER WHICH OTHER ANTI-DISCRIMINATION LAWS COMPORT WITH THE FIRST AMENDMENT; AND

3. TO RESOLVE A CONFLICT AMONG STATE COURTS ON A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW

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BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, ET AL. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

A. The Anti-Defamation League

The Anti-Defamation League ("ADL") is one of the nation's oldest civil rights organizations, founded in 1913 to promote good will among all races, ethnic groups and religions. As set out

in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For almost 80 years, ADL has been active in the fight against discrimination in employment, housing, education, and public accommodations. ADL also believes very strongly that the First Amendment embodies core civil rights that are essential to ADL's ultimate purpose. ADL is acutely aware that the war against racial hatred and religious intolerance must be waged in a manner that neither threatens nor impinges upon First Amendment freedoms.

After three consecutive years in which ADL's annual audit of anti-Semitic incidents revealed a dramatic increase in anti-Semitic violence nationwide, ADL developed a program in 1981 designed to counteract anti-Semitic and racist hatred and violence. Media exposure, education, and more effective law enforcement are important features of the campaign, but the cornerstone of ADL's program is the staunch support of so-called "hate crime" legislation providing enhanced penalties for certain crimes when they are committed by reason of the victim's actual or perceived race, religion, sexual orientation, or national origin. ADL has a direct interest in *State v. Mitchell*, Case No. 92-515, and *State v. Wyant, et al.*, Case No. 92-568, because the statutes set aside in both cases as unconstitutional were based on a model "hate crimes" bill drafted by ADL's Legal Affairs Department and first published by ADL in 1981.[1]

ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty enhancement hate crime legislation, in urging the Court to grant certiorari in both *Mitchell* and *Wyant*. These decisions by the Supreme Courts of Wisconsin and Ohio, improperly relying upon *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S., ___, 112 S. Ct. 2538 (1992), have cast a dark shadow of constitutional confusion and doubt – not only on the hate crime statutes now

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1. As explained further herein, in order to ensure that ADL's Model Bill did not run afoul of the First Amendment, ADL utilized language from various civil rights statutes had been upheld as constitutional. The original bill has undergone minor revisions since 1981, but its essence is unchanged.

in effect in 46 states and the District of Columbia (more than half of which are either based on or similar to ADL's Model Bill) – but also on proposed federal hate crime legislation presently under consideration in Congress. Certiorari must be granted to resolve this doubt and to provide essential guidance to perplexed legislators and law enforcement officials around the country. ADL firmly believes that most hate crime laws now in effect are consistent with the First Amendment, both on their face and as enforced. But unless the doubt and confusion on this point are resolved by the Court, the fight against ethnic intolerance and racist violence will be deprived of an essential weapon.

B. Additional *Amici Curiae*

The following organizations, listed alphabetically, join the ADL as *Amici Curiae* in urging the Court to grant the Petitions for Certiorari in *Mitchell* and *Wyant*. The interests of each such organization in *Mitchell* and *Wyant* are provided in Appendices A – M hereto:

Appendix	Organization
A	The American Jewish Congress
B	The Center for Women Policy Studies
C	The Fraternal Order of Police
D	The Human Rights Campaign Fund
E	The National Council of Jewish Women
F	The National Gay and Lesbian Task Force
G	The National Institute Against Prejudice & Violence
H	The National Jewish Community Relations Advisory Council
I	The National Organization of Black Law Enforcement Executives
J	The Organization of Chinese Americans
K	The Police Executive Research Forum
L	The Southern Poverty Law Center
M	The United States Conference of Mayors

SUMMARY OF THE ARGUMENT

Crimes in which the victim is selected because of his or her actual or perceived race, religion, color, disability, sexual orientation, national origin or ancestry are a problem of national scope. All indications are that such "hate crimes" are on the rise. In response, 46 states and the District of Columbia have enacted statutes which seek to redress hate crimes. Proposed federal legislation is under consideration in Congress. Certain legislators, law enforcement officials and a segment of the general population apparently believe that *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S. Ct. 2538 (1992), vitiated all such hate crime statutes, although the Supreme Court did not intend to do so. State courts considering hate crime laws in the wake of *R.A.V.* are taking diametrically opposed positions on the question of whether such laws comport with the First Amendment. The validity of other time honored anti-discrimination laws is being questioned because of their marked similarity to the hate crime statutes at issue in these cases.

Amici urge the Court to grant Certiorari in *State v. Mitchell*, Case No. 92-515, and *State v. Wyant*, Case No. 92-568, to provide badly needed guidance to state and federal legislators, to resolve the conflict among state courts on the constitutionality of hate crime legislation, and to confirm the basis under which other anti-discrimination laws comport with the First Amendment.

ARGUMENT

I. HATE CRIMES: A NATIONAL PROBLEM

In a suburb of Washington, D.C., two white men assault a black woman walking toward a shopping mall, rip off her clothes, douse her with lighter fluid and, yelling "nigger," threaten to set her on fire.[2] In the Crown Heights neighborhood of Brooklyn, New York, a mob's cries of "Kill the Jew" echo through the

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2. Twomey, Steve, *A Night of Hate in Wheaton*, Washington Post, March 5, 1992.

streets before a 29-year-old Jewish scholar is stabbed to death.[3] In Kentucky, a group of assailants beat a young gay man with a tire iron and lock him in a car trunk full of snapping turtles, leaving him with severe brain damage.[4] A riot erupts in Los Angeles, California after four white police officers are acquitted of illegally beating a black motorist, and, in the midst of the chaos, a group of black rioters pull a white motorist from his truck and viciously beat him. A young black man is struck by a car and murdered after a gang of young white men chase him onto a highway in a Queens, New York neighborhood called Howard Beach.

Like a recurring nightmare, Americans in every part of the country have awakened to these and a host of similar headlines in the past few years. And unfortunately, the racial, ethnic and anti-homosexual motivated crimes that make the headlines are but the tip of the iceberg of a national problem. Less publicized are the thousands of less sensational incidents of assault, battery, threats and vandalism prompted by the same animus.

The conduct targeted by the legislation at issue in *Mitchell* and *Wyant* is a distinct breed of criminal behavior, rooted in a set of motives unlike those that prompt conventional criminal acts. These are not incidents where a criminal – in the course of a burglary or a mugging – realizes his victim's minority status and utters a racist or anti-Semitic remark. These are crimes where the victim is selected *because* of his or her actual or perceived status; where the racial, religious or similar animus is the *reason* for the crime. And while such crimes are assuredly an ugly chapter in America's past, they cannot be relegated to the history books. There is every indication that violence prompted by the race, religion, ethnicity, sexual orientation or national origin of the victim is on the rise.

ADL has been closely tracking one type of hate crime – anti-Semitic violence and vandalism – since 1960. Broadening

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3. On the night of August 19, 1991, following the tragic accidental death of a black child in an automobile mishap, a group of young rioters stabbed Yankel Rosenbaum, who died late in a local hospital.

4. Peirce, Neal R., *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States.

its efforts, ADL began publishing in 1979 an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. The Audits conducted over the first three years revealed a substantial increase in anti-Semitic vandalism and violence. From 1982 to 1986, ADL's Audits revealed a general downward trend in such incidents. Suddenly, in 1987, the number of anti-Semitic incidents began to spiral upward. There was a 17% increase in anti-Semitic incidents in 1987 over 1986. For the next five years, the upward spiral continued, culminating last year with the highest total ever reported to ADL – 1,879 separate incidents of anti-Semitic violence, vandalism and harassment reported from 42 states and the District of Columbia.

The reported incidents included several fire-bomb and arson attacks on synagogues in California, Jewish cemetery desecrations in nine states and hundreds of assault incidents throughout the country. Most disturbing was the fact that for the first time since the Audits began, there were more attacks on Jewish individuals than against synagogues and property. The number of physical assaults in 1991 was double the number reported in 1990.

Hate crimes focused on other minorities are also on the rise. Recently, *Amicus Curiae* the United States Conference of Mayors sent a survey on hate crimes to over 1,000 cities. Between 1990 and 1991, incidents of hate violence increased in 36% of the responding cities and remained the same in 58%. Only 6% of the responding cities reported a decrease.[5] Data collected pursuant to various states' hate crime reporting regulations indicate a dramatic increase in hate crimes between 1990 and 1991 in Connecticut, Massachusetts and New Jersey, with Florida also reporting a rise. *Amicus Curiae* the National Gay and Lesbian Task Force reported 7,031 incidents of anti-homosexual violence in 1989.[6] A recent report revealed a 31%

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5. *Addressing Racial and Ethic Tensions: Combatting Hate Crimes in America's Cities,* United States Conference of Mayors, Anti-Defamation League, June 1992.

6. *Anti-Violence Project, National Gay and Lesbian Task Force, Anti-Gay Violence, Victimization and Defamation in 1989* (1990). See also, Note, *Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L.

increase in attacks on gay and lesbian individuals in each of five major metropolitan areas in 1991 over 1990.

II. PENALTY ENHANCEMENT HATE CRIME LEGISLATION: AN ESSENTIAL WEAPON IN THE FIGHT AGAINST HATE VIOLENCE

Amici recognize that hatred cannot be legislated out of existence and the long term solution to racism and ethnic bigotry is education and experience. Without a doubt, however, legislation that increases the penalty for hate crimes has been a powerful tool in redressing the problem.[7] Penalty enhancement hate crime legislation is key to the nationwide campaign against hate violence and vandalism. 46 states have now enacted some form of hate crime legislation, more than half of them based upon or similar to ADL's model penalty enhancement approach.[8]

The type of hate crime legislation sponsored by ADL since 1981 and upon which the statutes in *Mitchell* and *Wyant* are based centers on the principle of penalty enhancement. The concept is a simple one: bigoted thoughts or speech are not punished; each of the *Amici* believes very deeply in freedom of

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Rev. 1508, 1541–42 (1989).

7. The extent and national scope of the problem has prompted legislatures, law enforcement authorities and various organizations around the country to take a variety of other actions. For example, in 90, President Bush signed into law the Hate Crimes Statistics Act ("HCSA"), P.L. 101-275, which requires the Justice Department to acquire data on the hate crimes and to publish an annual summary of findings. This data is collected through the FBI's Uniform Crime Reporting Program, encompassing 16,000 state and local law enforcement agencies.

8. ADL's Model Bill provides as follows:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assualt and/or other appropriate statutorily prescribed criminal conduct).
>
> B. Intimidation is a ____ misdemeanor/felony (the degree of the criminal liabilty should be at least one degree more serious that that imposed for commission of the offense).

speech and thought – to borrow the words of Justice Holmes, this includes "freedom for the thought we hate."[9] Rather, it is only when the victim of a crime is selected "because of" or "by reason of" his or her minority status that the prosecutor may seek a stepped up penalty. And it is only the criminal act that is punished. Significantly, before the increased penalty can be imposed, the prosecution must prove, beyond a reasonable doubt, that the crime was bias-motivated.

This type of legislation serves several important purposes, squarely within the power and responsibility of state and local governments (and the federal government):

First and foremost, hate crime legislation embodies a crucial policy decision to recognize and address seriously the hate crime phenomenon. In terrorizing their victims and instilling fear and anxiety in the community, hate crimes are like other crimes. However, because of the unique and perverse motives that prompt them, hate crimes tear at the fragile bonds that hold together America's diverse and eclectic society. They not only intimidate and threaten the individual victim but also entire communities, making large sections of the population feel vulnerable and unprotected by the law. Hate crimes thus provoke retaliation and lawlessness, perpetuating a cycle of fear and mistrust between communities. Hate crime laws ensure that the targeted group perceives that law enforcement officials take their concerns seriously. By enforcing these laws, an isolated incident is less likely to create anxiety in the wider community; the potential of an incident to erupt into a widespread disturbance is minimized.

Second, law enforcement authorities believe these laws have a deterrent effect by making it clear that hate crimes will be considered particularly serious and will be dealt with accordingly. While there have been no studies on the point, it is apparent that law enforcement officials deeply appreciate the deterrent effect of hate crime laws. For example, when it became apparent that the Court's decision in *R.A.V.* was being misunderstood by large segments of the population to vitiate all

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9. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

hate crime laws, Chicago's Police Superintendent, the United States Attorney, the Cook County State's Attorney and various other Chicago law enforcement officials felt that they needed to hold a rare and widely publicized press conference to send the signal that there was no "window of opportunity" for bigots.[10]

Finally and simply, the penalty enhancement concept allows society to redress a unique type of wrongful conduct in a manner that reflects its seriousness. It is within the power of government to give such crimes the special treatment that they deserve. As aptly explained by the Supreme Court of Oregon in its recent decision upholding the Oregon hate crime law and specifically disagreeing with the decision in *Mitchell*,

> Such crimes – because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member – invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs. Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.

State v. Plowman, 314 Ore. 157, ____ P.2d ____, 1992 WL 207677 at *5 (1992).

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10. Sandberg, Michael A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5.

III. STATEMENT OF THE CASE

Amici Curiae adopt the Statements of the Case in the Petitions for Certiorari submitted in *Mitchell* and *Wyant*.

IV. CERTIORARI SHOULD BE GRANTED IN *STATE v. MITCHELL* AND *STATE v. WYANT*:

1. TO PROVIDE BADLY NEEDED GUIDANCE TO STATES AND THE FEDERAL GOVERNMENT ON THE CONSTITUTIONALITY OF PENALTY ENHANCEMENT HATE CRIME LEGISLATION;

2. TO CLARIFY THE BASIS UNDER WHICH OTHER ANTI-DISCRIMINATION LAWS COMPORT WITH THE FIRST AMENDMENT; AND

3. TO RESOLVE A CONFLICT AMONG STATE COURTS ON A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW.

Amici firmly believe that the Supreme Court did not intend to abrogate the laws now in effect in a majority of states (and presently under consideration in Congress) that increase penalties for bias-motivated crimes. In *Dawson v. Delaware*, ___ U.S. ___, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), the Court explained that evidence of racial intolerance is a valid factor in sentencing a defendant, "where such evidence [is] relevant to the issues involved:"

> [T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Dawson, 112 S. Ct. at 1097.

Similarly, in *R.A.V.*, *supra*, the Court made clear that conduct is not shielded from regulation merely because it may "express" a discriminatory idea or philosophy (where such conduct is not targeted on the basis of its expressive content). 112 S. Ct. at 2546-47. Unlike the St. Paul, Minnesota ordinance involved in *R.A.V.*, ADL's recommended approach, embodied

in the Wisconsin and Ohio statutes at issue in *Mitchell* and *Wyant*, does not target conduct on the basis of its expressive content but targets conduct already defined as criminal.[11] Penalties are enhanced – not because of any message or thought conveyed through the crime – but because a particularly heinous motive prompted the selection of the victim, and because society has an interest in minimizing the potentially wide-ranging effects of this type of crime.

To the extent that a racial or anti-Semitic assault or a "gay-bashing" express certain "thoughts" or "beliefs," the penalty enhancement approach is admittedly a form of "content discrimination." However, since penalties are enhanced for actions already defined as criminal, "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. Under the penalty enhancement approach, it is criminal conduct that is sought to be "suppressed," not the ideas or philosophies that prompt hate crimes. As the Court acknowledged in *R.A.V.*, "We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *R.A.V.*, 112 S. Ct. at 2544. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activity that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"). In the words of this Court,

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit

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11. The *Amici* did not all agree that the St. Paul ordinance at issue in *R.A.V.* was constitutional. ADL, for example, filed a brief in *R.A.V.*, supporting the City of St. Paul's position. (ADL acknowledged, however, that the St. Paul ordinance – in sanctioning a racist and bigoted messages rather than enhancing penalties for bias-motivated crimes – was not ADL's recommended approach. ADL believed the St. Paul ordinance was constitutional only because the Minnesota Supreme Court limited its applicability to "fighting words"). All of the *Amici* herein agree that the statute at issue in *Mitchell* and *Wyatt* comport with the First Amendment.

> that may be derived from them is clearly outweighed by the social interest in order and morality.'

R.A.V., 112 S. Ct at 2542-43.

The Wisconsin and Ohio statutes do not punish "speakers who express views on disfavored subjects," *R.A.V.*, 112 S. Ct. at 2547, or attempt to "drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, ___ U.S. ___, 112 S. Ct. 501, 508 (1991). These and other penalty enhancement hate crime statutes leave racists and bigots free to think, speak, believe and express their views within the full range of permitted conduct under the First Amendment.

Despite the Court's careful language in *R.A.V.* (and other decisions such as *Dawson* and *Barclay*), commentators, courts, law enforcement authorities and a large segment of the general population have been left utterly confused about the impact of *R.A.V.* on the hate crime laws in effect in 46 states and the District of Columbia. The Supreme Court's decision in *R.A.V.* was widely reported in the media as potentially jeopardizing all hate crime laws.[12] For example, the Boston Globe reported, "The *[R.A.V.]* ruling calls into question the hate crime laws adopted nationwide during the past decade. . . . its eventual impact remains unclear."[13] The *Washington Post* reported, "The Supreme Court yesterday unanimously struck down a St. Paul, Minn., hate crimes law, casting doubt on the constitutionality of scores of other state and local laws . . ."[14] One scholar noted that "*[i]*t's going to be very difficult for elected officials, and maybe even the lawyer retained to give them advice, to say with certainty what can be prohibited and what cannot."[15]

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12. Freeman, Steven M., *Hate Crimes: They're Still Against the Law*, ADL On the frontline, September 1992, at B-1.

13. Lehr, Dick, *High Court Overturns 'Hate Crime' Ordinance*, Boston Globe, June 23, 1992, at National/Foreign 1.

14. Marcus, Ruth, *Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far-Reaching*, Washington Post, June 23, 1992, at A-1.

15. Campbell, Geoffrey A., *Supreme Court Rejects St. Paul Ordinance Banning Hate Speech; Gives No Guidance*, Bond Buyer, June 23, 1992, at 2.

Most disturbing has been the impact on those law enforcement authorities dedicated to enforcing hate crime laws. After the *R.A.V.* decision was handed down, certain of ADL's regional offices reported that police officers were declining to take hate crimes reports because they thought that the statutes were no longer constitutional.[16] The *Wall Street Journal* reported: "Confusion over the constitutionality of hate-crime statutes has made some law-enforcement officials and judges wary about enforcing the laws, even though many would likely survive court challenges."[17] According to the *Wall Street Journal*, "the misunderstandings have led attorneys general in Minnesota and Massachusetts to plan a mailing to law enforcement officers and district attorneys reminding them that they should continue to enforce hate-crime laws."[18]

The House Judiciary Subcommittee on Crime and Criminal Justice held hearings on the impact of *R.A.V.* on the proposed federal hate crime legislation at which several constitutional scholars testified.[19] As aptly summarized by Congressman

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16. Sandberg, Mitchell A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5. Many callers on talk radio shows believed that the Supreme Court had gone so far as to declare perfectly lawful the midnight cross-burning by a white teenager on the lawn of a black family in a primarily white St. Paul, Minnesota neighborhood.

17. Hetter, Katia, *Enforcers of Hate-Crime Laws Wary After High Court Ruling*, Wall Street Journal, August 13, 1992, at B-1.

18. Hetter, *supra* at n. 17.

19. The proposed federal law, H.R. 4797, provides:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

SECTION 2. DIRECTION TO COMMISSION.

(a) IN GENERAL—Pursuant to section 994 of title 28, United Stated Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. In carrying out this section, the United States Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances which might justify exceptions.

(b) DEFINITION.—As used in this Act, the term "hate crimes" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice,

Charles E. Schumer in his opening remarks at the hearing,

> [T]he efforts of the States and the Federal Government have been thrown into turmoil in the wake of the Supreme Court's recent decision in *R.A.V. v. The City of St. Paul*. That decision raised almost as many questions as it answered. Are all hate crimes statutes unconstitutional? Are hate crimes sentencing enhancement statutes unconstitutional? The *R.A.V.* decision is already having a substantial impact on courts that are attempting to grapple with these questions.

While some of the scholars and practitioners who testified believed that the proposed House bill did not run afoul of the First Amendment in light of *R.A.V.*, some had serious doubts and some expressed the view that the bill would be held unconstitutional.

If the Petitions for Certiorari in *Mitchell* and *Wyant* are granted, the Court can render clear answers to these questions, provide badly needed guidance to state and federal governments and law enforcement officials, and curtail what will surely be long, expensive and frustrating litigation on the "meaning" of *R.A.V.* as respects other hate crime laws.

Amici urge the Court to grant the Petitions in both cases, rather than to select one as more deserving of consideration than the other. By considering both cases, the Court will be in a better position to resolve once and for all certain of the First Amendment issues that have arisen under hate crime laws. The impact of constitutional considerations on a wider variety of underlying facts and circumstances can be analyzed. Certain differences in the statutory language adopted in Wisconsin and Ohio can also be addressed. In sum, more meaningful and useful guidance will be provided to legislators, courts and law enforcement authorities in 46 states by considering both *Mitchell* and *Wyant*.

NOTES *(Continued)*

based on the actual or perceived race, color, religion, national origin, ethnicity, gender,or sexual orientation of antoehr individual or group of individuals.

Petitioners in their respective Briefs have provided excellent arguments for the granting of Certiorari, and *Amici* will not burden the Court by repeating their arguments here. We emphasize, however, that three immediate and disastrous consequences of the *R.A.V.* decision's misinterpretation will be rectified if the Court grants the Petitions for Certiorari in *Mitchell* and *Wyant*:

THE COURT CAN REINSTATE THE WISCONSIN AND OHIO STATUTES AND PREVENT SIMILAR MISINTERPRETATIONS OF *R.A.V.* IN OTHER STATES

First, the Court can right the course of hate crime legislation in the states of Wisconsin and Ohio, and prevent the potential derailment of hate crime legislation in other states. Because the Supreme Courts of Wisconsin and Ohio have utterly misinterpreted *R.A.V.* and other decisions by the United States Supreme Court, the people of Wisconsin and Ohio have been deprived of an essential weapon in the fight against racial and ethnic violence that fully comports with the requirements of the First Amendment.

While Petitioners in both cases have ably explained this point, we stress one important issue. As noted above, in *Dawson*, supra, and *Barclay*, supra, the Court made clear that evidence of racial intolerance is a valid factor in sentencing a defendant. In *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597 (1991), the Court found that victim impact evidence is a legitimate factor in sentencing.

The *Mitchell* court's flawed reasoning is nowhere more apparent than in its effort to distinguish its holding from *Dawson* and *Barclay*. The thin reed upon which the Wisconsin court bases its remarkable conclusion that the motivation for a crime is "entitled to the full protection of the First Amendment" is that the sentencing factors considered by a judge are somehow accorded greater deference than sentencing factors provided in a statute. The Court stated:

> Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but

> it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

Mitchell, 485 N.W. 2d. at 815, n. 17.

Since the end result of both a judge-imposed and a legislature-imposed penalty for a hate crime is an enhanced sentence, the Wisconsin court's argument is a distinction without a difference. As the Petitioner in *Mitchell* points out, the Supreme Court has long held that sentencing is a power shared by the legislative and judicial branches. *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

It *is* "quite a different matter" to include a penalty enhancer in a statute rather than rely on a judge to enhance penalties in sentencing a defendant, but the difference is not what the Wisconsin court had in mind. A defendant accused of selecting his victim because of racial or ethnic animus is afforded far greater procedural safeguards in a legislature-imposed enhanced sentence under ADL's model legislation and the statutes at issue in *Mitchell* and *Wyant* than in a judge-imposed enhanced sentence (as permitted under *Dawson, Payne* and *Barclay*). As opposed to the factors that judges may consider in sentencing, under the ADL model law and the Wisconsin and Ohio statutes, a sentence may only be enhanced if the bias-motive is proven *beyond a reasonable doubt*. Thus, to the extent that there is any difference between what the Supreme Court permits in *Dawson, Payne* and *Barclay* and what legislatures accomplish in enacting hate crime legislation, it is that the legislative approach has the added prophylactic benefit of a higher evidentiary standard.

THE COURT CAN CLARIFY THE BASIS UPON WHICH ANTI-DISCRIMINATION LAWS COMPORT WITH THE FIRST AMENDMENT

A second adverse result of *R.A.V.*'s misinterpretation that can be rectified by the granting of Certiorari in *Mitchell* and *Wyant* is the overriding perception that – from Title VII to the

Fair Housing Act to antidiscrimination laws in education and jury selection – *R.A.V.* renders questionable the constitutionality of the nation's body of anti-discrimination laws. As Justice Bablitch asks in his dissent in *Mitchell*, "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?" In his testimony before the House Subcommittee considering the constitutionality of the proposed House Bill on hate crimes, Professor Laurence Tribe noted: "If *R.A.V.* were to cast a constitutional shadow over the Hate Crimes Sentencing Enhancement Act, precisely the same shadow would befall this entire corpus of anti-discrimination law."

The Wisconsin Supreme Court's struggle to reconcile its decision overturning the Wisconsin hate crime law (improperly relying on *R.A.V.*) with state and federal anti-discrimination laws is a prime example of the manner in which anti-discrimination laws have been drawn into the fray over hate crime laws. The court stated:

> We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

Mitchell, 485 N.W.2d at 817, n. 21

This reasoning is doubly wrong. Penalty enhancement hate crime legislation is no more concerned with motive and no less concerned with conduct than anti-discrimination laws. In language, structure and application, the laws are completely analogous.[20] Under the Wisconsin law, the penalty is enhanced where the victim is intentionally selected "*because of*" his or her race, religion, color, disability, sexual orientation, national origin or ancestry. Under the Ohio law, the penalty is enhanced

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20. As noted above, ADL's Legal Affairs Department employed the language and structure of federal and state anti-discrimination laws (already upheld as constitutional) in drafting the Model Bill in 1981.

if the victim is selected "*by reason of*" his or her race, color, religion, or national origin. Similarly, Title VII, as amended by § 2000e-2(a)(1), prohibits various employment actions "*because of*" the employee or prospective employee's race, color, religion, sex or national origin. 42 U.S.C. § 3604 prohibits interference with housing choices "*because of* [the victim's] race, color," or other listed status.

Moreover, to rest so important a point on a presumed distinction between "redressing" and "punishing" begs the question. "Punishment" is a form of "redressing;" to say that it is permissible to consider motive when "redressing" conduct, but impermissible where society "punishes" for the same conduct is word play. It is also incorrect, for as Petitioner in *Mitchell* points out, criminal penalties do attach to certain anti-discrimination law violations. Further, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages depending on such factors as the defendant's "evil motive or intent. . . " *Smith v. Wade*, 461 U.S. 30, 56 (1983). "This issue 'typically demands inquiry into the actor's subjective motive and purpose.'" Smith, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

THE COURT CAN RESOLVE A CLEAR AND DIRECT CONFLICT AMONG STATE COURTS ON A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW

A third untoward result of *R.A.V.*'s misinterpretation by the Wisconsin and Ohio Supreme Courts that can be remedied by the granting of Certiorari in *Mitchell* and *Wyant* is the direct conflict that now exists between several states on a substantial question of federal constitutional law. States are taking diametrically opposed positions on the application of the First Amendment to hate crime laws.

For example, one day after the Ohio Supreme Court's decision overruling the Ohio hate crime penalty enhancer, the Oregon Supreme Court held that an analogous Oregon law satisfied the requirements of the First Amendment as interpreted in *R.A.V. State v. Plowman*, 314 Ore. 157, ___ P.2d

____, 1992 WL 207677 (1992). The Oregon court expressly disagreed with the reasoning of the Wisconsin court in *Mitchell*.

More recently, a Florida intermediate appellate court held that Florida's hate crime law, also based on the ADL model bill and also similar to the statutes overturned in *Mitchell* and *Wyant*, fully comported with the requirements of the First Amendment and this Court's decision in *R.A.V. Dobbins v. State of Florida*, Case No. 91-1953 (Fla. 5th DCA September 25, 1992).

A New York court has also upheld the constitutionality of a penalty enhancement hate crime law. *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

Cases in which the constitutionality of hate crime laws are at issue are presently pending before intermediate appellate and supreme courts in California, Florida, New Jersey, Michigan, Vermont and the State of Washington.

In sum, the interplay between the First Amendment and hate crime legislation enacted in 46 states is now in a perilous state of flux and turmoil. The situation is intolerable. Certiorari must be granted in *Mitchell* and *Wyant* to guarantee the uniform application of the United States Constitution throughout the nation.

CONCLUSION

For the reasons stated herein, *Amici Curiae* urge the Court to grant Certiorari in *State v. Mitchell* and *State v. Wyant, et al.*

Respectively submitted,

David M. Rain

Counsel for *Amici Curiae*

APPENDIX A: THE AMERICAN JEWISH CONGRESS

The American Jewish Congress is an organization founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has long supported the use of the law, including the criminal law, to punish those who would discriminate against American citizens because of their race, religion, sex, sexual orientation, or national origin. Crimes in which the victim is selected because of these suspect grounds tear at the fabric of society. Such offenders must be treated and punished with utmost seriousness.

Because Ohio and Wisconsin's laws are important weapons in the war against violent bigotry, the American Jewish Congress joins in this brief.

APPENDIX B:
THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies (the "CWPS") was established in 1972 as the first independent national public policy research and advocacy institute focused specifically on improving the social, legal, and economic status of women. Underlying all of the Center's work is the premise that sexism and racism must be addressed simultaneously. The Center looks at the impact of combined race- plus-sex bias on women of color, women from diverse socioeconomic backgrounds, women of diverse sexual identities, women with disabilities, and women of different ages. In 1991 the Center published a policy paper, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, participated in coalitions and task forces on hate crimes and the Violence Against Women Act. In September, 1992 the CWPS convened a "Think Tank" to consider the efficacy and legitimacy of defining civil rights remedies for acts of hate violence against women. Based on our concern and interest for individual rights we join in urging the Court to grant the petitions for the writ of Certiorari.

APPENDIX C:
THE FRATERNAL ORDER OF POLICE

The Fraternal Order of Police (FOP) is the nation's largest law enforcement organization; with over 240,000 members throughout the United States. Founded in 1915, the FOP represents professional, full-time officers from all agencies of law enforcement on the federal, state and local levels.

Through the years, the FOP has developed a proud tradition of leadership in national affairs and has a history of commitment to insuring that society as a whole is equally protected under the law.

The FOP believes that hate crimes deprive society of this equal treatment under the law and the nation's law enforcement has more than a mere duty to respond against this bias.

Assisting law enforcement in their endeavor to insure equal treatment under the law are statutes in certain states (31) that provide for penalty enhancement for violations of hate crimes laws. The FOP also believes these penalty enhancement statutes also serve as a deterrent to would-be violators.

The FOP believes that the question raised by the rulings in *State v. Mitchell* and *State v. Wyant* threaten the effective policing of hate crimes which is so important to the order of this nation.

APPENDIX D:
THE HUMAN RIGHTS CAMPAIGN FUND

The Human Rights Campaign Fund is the largest political organization representing gay and lesbian Americans. Hate crimes motivated by the sexual orientation of the victim are on the rise in many major American cities, and the National Institute of Justice has estimated that crimes against gay and lesbian Americans may be the largest category of hate crimes. The Human Rights Campaign Fund and the Americans it represents believe that government must have the tools, such as the laws at issue in this case, to deal effectively with this growing problem.

APPENDIX E:
THE NATIONAL COUNCIL OF JEWISH WOMEN

Founded in 1893, the National Council of Jewish Women ("NCJW") is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our "National Resolutions," which include working for "the enactment and enforcement of laws and regulations which protect individual rights and civil liberties", we join in urging the Court to grant the petitions for writ of Certiorari.

APPENDIX F:
THE NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force ("NGLTF") is the oldest national gay and lesbian civil rights advocacy organization in the U.S. Since 1973, NGLTF has worked to eradicate prejudice, discrimination and violence based on sexual orientation and HIV status. Since 1984, NGLTF has noted in its annual audit of anti-lesbian and anti-gay incidents a steady rise in defamation, harassment, violence and attacks. NGLTF supports hate crimes penalty enhancement legislation as part of the overall effort to count and counter crimes which target individuals on the basis of their race, religion, creed, color, sex, national origin or sexual orientation.

NGLTF balances its interest in countering violence against lesbians and gay men with its interest in protecting First Amendment rights. NGLTF has been at the forefront of the fight to support the right of lesbians and gay men to speak their minds and publish their ideas. Indeed, NGLTF is acutely aware that bias violence abridges the First Amendment rights of its victims by making them afraid to assemble and organize.

It is out of these dual interests that NGLTF joins ADL in urging the Court to grant Certiorari in both *Mitchell* and *Wyant* to resolve the confusion and doubt cast by these decisions.

APPENDIX G:
THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

The National Institute Against Prejudice & Violence ("NIAPV"), created in 1984, is the only national center dedicated exclusively to studying and responding to ethnoviolence – psychological and physical violence motivated by race, religion, ethnicity, sexual orientation or gender. While other organizations deal with selected aspects of these problems, NIAPV is unique in its comprehensive approach. NIAPV's landmark social science research is the foundation of training and educational programs addressing the causes and effects of ethnoviolent victimization in communities, schools and workplaces; cultural differences that cause intergroup tension; effective communication and conflict resolution; and the development of procedures for reporting and responding to incidents. NIAPV also acts as a clearinghouse of information on reported incidents of intergroup conflict and model programs of response; tracks the quantity and quality of news media activity; publishes reports and educational materials; and works for the enactment of appropriate legislation.

NIAPV's research clearly establishes both the pervasiveness of ethnoviolence as well as the greater traumatic impact of ethnoviolence on the victim. In a 1987 study of a college campus ("The UMBC Study") NIAPV found that 20 percent of all minority students experienced at least one act of ethnoviolence during the academic year studied. Numerous replications of The UMBC Study at campuses around the country, and analysis of other similar campus research, confirm the 20 percent figure as a conservative estimate of the number of minority students nationwide who are victims of ethnoviolence during an academic year. The traumatic effects of the victimization were found to be often serious and long-lasting.

In 1989, pursuant to a grant from the Ford Foundation, NIAPV conducted the first national study of the prevalence and impact of ethnoviolent victimization in the general population ("The National Victimization Survey"). The findings of this study, based upon telephone interviews completed with 2,078

people in a stratified random sample of the contiguous United States, showed that at least 7 percent of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. On a scale of nineteen, standard psychophysiological symptoms of stress, victims of ethnoviolence suffered, on average, 21% more of these symptoms than did victims of similar acts of ordinary violence or abuse (5.8 symptoms versus 4.8). Preliminary findings of a recently-completed study of a large corporate setting, funded by the National Institute of Justice, confirm the earlier studies and indicate that ethnoviolence is even more pervasive in the workplace than in the larger community.

NIAPV's research consistently finds that verbal and symbolic expressions of prejudice cause measurable and substantial trauma to their targets. Still, NIAPV has always held that most such expressions, as odious as they are, must be protected by the First Amendment if freedom of speech is to remain a central value of our society. For example, NIAPV believes that group defamation is protected by the First Amendment; and most face-to-face insults and slurs which do not amount to actual threats of violence or "fighting words" are also protected speech. In such cases it is our responsibility to understand who is paying the price to preserve the freedom of speech and to take committed action in other areas to ameliorate the harmful effects on its victims.

Millions of Americans know firsthand the vicious harm inflicted by acts of ethnoviolence, and this is reflected in wide and strong support for the many so-called "hate crime" laws which have been enacted in the states. The recent uprisings in Los Angeles and other cities are truly the tip of a large and explosive iceberg of intergroup tensions and conflict. While the law alone cannot begin to solve these problems, nevertheless it has a critical role to play in combatting their most harmful manifestations. NIAPV believes that the ADL model "hate

crime" statute represents a responsible and effective effort to combat ethnoviolent crimes while protecting the freedom of speech under the First Amendment. The decisions in *State v. Mitchell* and *State v. Wyant* reflect confusion over the appropriate First Amendment standards by which "hate crime" laws should be evaluated. The corrective guidance of this Court is desperately needed.

For the reasons stated above, NIAPV joins ADL in urging the Court to grant the Petitions for Certiorari in *Mitchell* and *Wyant*.

APPENDIX H:
THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization for Jewish community relations in the United States, and consists of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member agencies representing Jewish communities throughout the United States (listed below).

As the national planning and coordinating body for the field of Jewish community relations, NJCRAC is dedicated to preserving and protecting the principles embodied in the Bill of Rights – particularly the First Amendment – and is equally committed to the counteraction of discrimination and bigotry in the society. The NJCRAC believes that this balancing of sometimes conflicting interests, in the larger context of constitutional protections, is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

NJCRAC Constituent Organizations

National Agencies

American Jewish Committee
American Jewish Congress
B'nai B'rith
Anti-Defamation League
Hadassah
Jewish Labor Committee
Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations

Union of Orthodox Jewish Congregations of America
United Synagogue of Conservative Judaism/Women's League for Conservative Judaism
Women's American ORT

Community Agencies*

Alabama

CRC of the Birmingham Jewish Federation

Arizona

CRC of the Greater Phoenix Jewish Federation JCRC of the Jewish Federation of Southern Arizona

California

Jewish Federation of Greater Long Beach and West Orange County
CRC of the Jewish Federation- Council of Los Angeles
JCRC of the Greater East Bay
Jewish Federation of Orange County
JCRC of Sacramento
JCRC of United Jewish Federation of San Diego
JCRC of San Francisco, the Peninsula, Marin and Sonoma Counties
JCRC of Greater San Jose

Connecticut

Jewish Federation of Greater Bridgeport
Jewish Federation of Greater Danbury
Jewish Federation of Eastern Connecticut
CRC of Greater Hartford Jewish Federation
Jewish Federation of Greater New Haven
United Jewish Federation of Stanford
Jewish Federation of Waterbury

Delaware

Jewish Federation of Delaware

District of Columbia

Jewish Community Council of Greater Washington

Florida

Jewish Federation of South Broward
Jewish Federation of Fort Lauderdale
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Jewish Federation of Greater Orlando
Jewish Federation of Palm Beach County
Jewish Federation of Pinelas County
Sarasota-Mantes Jewish Federation
South Palm Beach County Jewish Federation

Georgia

Atlanta Jewish Federation
Savannah Jewish Federation

Illinois

JCRC of the Jewish Limited Fund of Metropolitan Chicago
Jewish Federation of Peoria
Springfield Jewish Federation

Indiana

Indianapolis JCRC
Jewish Federation of St. Joseph Valley

Iowa

Jewish Federation of Greater Des Moines

Kansas

(See Missouri)

Kentucky

Central Kentucky Jewish Federation
Jewish Community Federation of Louisville

Louisiana

Jewish Federation of Greater Baton Rouge
Jewish Federation of Greater New Orleans
Shreveport Jewish Federation

Maine

Jewish Federation Community Council of Southern Maine

Maryland

Baltimore Jewish Council

Massachusetts

JCRC of Greater Boston
Jewish Federation of North Shore
Jewish Federation of Greater New Bedford
Jewish Federation of Greater Springfield
Worcester Jewish Federation

Michigan

Jewish Community Council of Metropolitan Detroit
Flint Jewish Federation

Minnesota

JCRC/Anti-Defamation League of Minnesota and the Dakotas

Missouri

Jewish Community Relations Bureau/American Jewish Committee of Greater Kansas City
St. Louis JCRC

Nebraska

ADL/CRC of the Jewish Federation of Omaha

New Jersey

Federation of Jewish Agencies of Atlantic County

United Jewish Community Bergen County/North Hudson
Jewish Federation of Central New Jersey
Jewish Federation of Clinton-Passaic
MetroWest United Jewish Federation
Jewish Federation of Greater Middlesex County
JCRC Jewish Federation of North Jersey
JCRC of Southern New Jersey
Jewish Federation of Mercer and Bucks Counties

New Mexico

Jewish Federation of Greater Albuquerque

New York

Jewish Federation of Broome County
Jewish Federation of Greater Buffalo
Elmira Jewish Welfare Fund Jewish Federation of Greater Kingston
JCRC of New York
United Jewish Federation of Northeastern New York
Jewish Federation of Greater Orange County
Jewish Community Federation of Rochester
Syracuse Jewish Federation
Utica Jewish Federation

Ohio

Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
CRC of the Columbus Jewish Federation
JCRC of the Jewish Federation of Greater Dayton
CRC of the Jewish Federation of Greater Toledo
JCRC of Youngstown Area Jewish Federation

Oklahoma

Jewish Federation of Greater Oklahoma City
Jewish Federation of Tulsa

Oregon

Jewish Federation of Portland

Pennsylvania

CRC of the Jewish Federation of Allentown
Erie Jewish Community Council
CRC of the United Jewish Federation of Greater Harrisburg
JCRC of Greater Philadelphia
CRC of the United Jewish Federation of Pittsburgh
Scranton-Lackawanna Jewish Federation
Jewish Federation of Greater Wilkes-Barre

Rhode Island

CRC of the Jewish Federation of Rhode Island

South Carolina

Charleston Jewish Federation
Columbia Jewish Federation

Tennessee

JCRC of the Memphis Federation Council
Jewish Federation of Nashville and Middle Tennessee

Texas

Jewish Federation of Austin
Jewish Federation of Greater Dallas
JCRC of the Jewish Federation of El Paso
Jewish Federation of Fort Worth and Tarrant County
CRC of the Jewish Federation of Greater Houston
JCRC of the Jewish Federation of San Antonio

Virginia

United Jewish Community of the Virginia Peninsula
Jewish Community Federation of Richmond
United Jewish Federation of Tidewater

Washington

Jewish Federation of Greater Seattle

Wisconsin

Madison Jewish Community Council
Milwaukee Jewish Council

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*"CRC" – Community Relations Committee or Council; "JCRC" – Jewish Community Relations Council

APPENDIX I:
THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES

The National Organization Of Black Law Enforcement Executives ("NOBLE") is a non-profit organization of police chiefs, agency heads, command-level law enforcement officials and criminal justice educators whose membership is numbered at approximately 2400. NOBLE's goals are to develop, implement and manage innovative ideas, concepts and programs aimed at reducing violence, crime, and the elimination of racism in the criminal justice arena. NOBLE was founded in September, 1976, during a three day symposium co-sponsored by the Police Foundation and the Law Enforcement Assistance Administration (LEAA).

Consistent with its motto, "Justice by Action," NOBLE aggressively pursues its goalsz by conducting substantive research, speaking out on the issues and performing a variety of outreach activities. NOBLE's success in this arena is reflected by its growth and the major role it has played, and continues to play, in shaping policy in areas of vital importance to minorities and the law enforcement community. NOBLE has effectively used the judicial process and direct correspondence to express opinions and concerns. NOBLE has endorsed strategies that provide a holistic approach to crime and violence and proactive policy- community involvement.

What has come to be known as hate violence, racial and religious violence and harassment was first researched by NOBLE in 1983. NOBLE received funding from the National Institute of Justice (NIJ) to do research on the problem and to develop model policies and procedures for law enforcement agencies.

As a result, NOBLE published a law enforcement handbook that outlines a model response to racial and religious violence which is used broadly by the law enforcement community and social service practitioners. NOBLE provided education and advocacy that resulted in the passage of federal legislation requiring the collection of data on the occurrence of hate violence incidents. With a grant from the Ford Foundation,

NOBLE has drafted a training program and produced a videotape for law enforcement workers on racial violence entitled *Hate Crime: a Policy Perspective* aimed at training police officers in effective procedures for handling hate crimes. In addition, NOBLE has developed a training curriculum to deal with cultural clashes on college campuses. The curriculum is designed to sensitize college administrators, students and law enforcement personnel to the issue of racism.

Consequently, NOBLE joins the ADL in urging the Court to grant Certiorari in State v. Mitchell and *State v. Wyant*.

APPENDIX J:
THE ORGANIZATION OF CHINESE AMERICANS

Founded in 1973, The Organization of Chinese Americans, Inc. ("OCA") is one of the largest national Chinese American organizations seeking equal rights and equal protection under the law. With 42 chapters nationwide and over 5,000 members, OCA is committed to developing the full participation of Asian Americans in the American political process.

Due to the increasing incidence of anti-Asian violence, OCA has worked extensively with other organizations toward the elimination of hate crimes through legislative, educational, and community efforts. Based on OCA's concern for civil rights, we join in urging the court to grant the petitions for the writ of Certiorari.

APPENDIX K:
THE POLICE EXECUTIVE RESEARCH FORUM

The Police Executive Research Forum ("PERF") is a national organization of police executives from large- and medium-sized jurisdictions dedicated to promoting progressive policing through research, education, debate and national leadership.

Because of our commitment to protecting all persons equally under the law and the devastation that hate crimes can wreak on victims and their communities, PERF believes that the police community should aggressively seek out and respond to bias crime incidents. One tool police in 31 states now have to combat hate crime is the penalty enhancement statute. Penalty-enhancement statutes send a strong message to the public that law enforcement authorities take hate crimes very seriously and that perpetrators will face considerable punishment. We believe that penalty-enhancement statutes, when used as part of a comprehensive approach to hate crime, are effective and important tools – tools that are now in question as a result of the rulings in *State v. Mitchell* and *State v. Wyant*.

APPENDIX L:
THE SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center is a non-profit organization founded in 1971 to protect the rights of poor people and minorities. Its attorneys have litigated numerous human and civil rights cases in federal and state courts across the country, including cases focusing on racial and sexual discrimination, voting rights, capital punishment, and racial violence.

In 1979, the Center established the Klanwatch Project to monitor the activities of white supremacist organizations and individuals throughout the United States. Klanwatch has been instrumental in providing federal and state law enforcement authorities with substantial assistance in combatting and prosecuting hate crimes and has developed the largest intelligence base on white supremacist groups that exists in this country. Using that data base, the Center itself has brought many successful civil lawsuits against white supremacist groups and their members. *See, e.g., Berhanu v. Tom Metzger, et al.,* No A-8911-07007 (Ore. Cir. Ct.) (civil section against the White Aryan Resistance and its leaders and agents for the beating death of an Ethiopian student in Oregon); *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (criminal contempt proceeding against Klan members violating a court order against paramilitary activities); *McKinney v. Southern White Knights*, No C87-565-CAM (N.D. Ga. 1988) (civil action against Klan groups and individuals for assaulting peaceful civil rights marchers); *Donald v. United Klans of America*, No. 84-0725 (S.D. Ala. 1987) (civil action on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F.Supp. 993 (S.D. Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

The Southern Poverty Law Center is deeply concerned about the steady rise in hate crimes by various fringe groups and white supremacist organizations, and believes that the interest of law enforcement would be greatly served by the Court's grant of *certiorari* in this case to resolve the uncertainties created as a result of the decision in *R.A.V. v. City of St. Paul, Minnesota,* ___ U.S. ___, 112 S. Ct. 2538 (1992).

APPENDIX M:
THE UNITED STATES CONFERENCE OF MAYORS

The United States Conference of Mayors is a not-for-profit organization organized under the laws of the State of Illinois, with its offices in Washington, D.C. The organization represents approximately 1,000 mayors of cities with a population of over 30,000, assuring that the interests of cities are represented in the development of national public policy and providing information and assistance to mayors and other city officials on a variety of urban issues.

The United States Conference of Mayors joins the ADL in urging the Court to grant Certiorari in *Mitchell* and *Wyant*.